INDEX

	Page
Docket entries	1
Complaint	2
Declaration of taking	8
Order for delivery of possession	11
Notice of appearance of Chester Fuller and Maxine Fuller	12
Pretrial order	13
Colloquy on landowners' opening argument	15
Testimony of Percy E. Coe, for the landowners	18
Testimony of Lawrence S. Perry, for the landowners	19
Testimony of Chester Fuller, landowner	24
Testimony of J. N. McDougal, for the landowners	25
Closing address for the landowners	26
Instructions by the court	26
Government's objections to instructions	27
Jury's verdict	28
Judgment	30
Notice of appeal	33
Decision of the Court of Appeals for the Ninth Circuit	34
Petition of the United States for rehearing	40
Order denying petition for rehearing	47
Order of the Supreme Court of the United States granting a writ of certiorari	48

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

RELEVANT DOCKET ENTRIES

1. Complaint in condemnation, filed Sept. 29, 1967.
2. Declaration of taking, tendered Sept. 29, 1967.
3. Order for delivery of possession, filed Sept. 29, 1967.
4. Notice of appearance of Chester Fuller & Maxine Fuller filed Oct. 18, 1967.
5. Pretrial order, filed May 27, 1968.
6. Trial order with jury verdict, filed June 17, 1968.
7. Judgment, filed Sept. 24, 1968.
8. Notice of appeal, filed Nov. 21, 1968.
9. Decision of court of appeals dated Apr. 29, 1971.
10. Judgment of court of appeals filed April 29, 1971.
11. Petition for rehearing by the United States filed June 16, 1971.
12. Order denying rehearing, filed June 23, 1971.
13. Order granting writ of certiorari, dated Jan. 17, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; CHESTER FULLER, et al., and UNKNOWN OWNERS, DEFENDANTS.	No. Civ. 6471 Phx. Complaint in Condemnation

[Filed Sep. 29, 1967, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

1. This is an action of a civil nature brought by the United States of America at the request of the Acting Secretary of the Army for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591) and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which authorize the acquisition of land for flood control projects; the Act of Congress approved December 22, 1944 (Public Law 534-78th Congress), which act authorizes the construction of Alamo Reservoir-Bill Williams River, Arizona, Colorado River Basin; and the Act of Congress approved October 15, 1966 (Public Law 89-689), which appropriated funds for such purposes.

3. The use for which the property is to be taken is in connection with the establishment of a flood control dam and reservoir at the Alamo site on the Bill Williams River, Arizona.

4. The interest in the property to be acquired is as follows:

a. The fee simple title to Tracts Nos. 309 and 310 subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

b. A perpetual and assignable easement and right-of-way in, on, over, and across Tracts Nos. 200-E and 201-E, for the location, construction, operation, maintenance, alteration, and replacement of a road and appurtenances thereto; together with the right to trim, cut, fell, and remove therefrom all trees, underbrush, obstructions, and other vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the owners, their heirs, successors and assigns, the right to use the surface of the land as access to their adjoining land; subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

5. The property so to be taken is described in the Exhibit A hereto attached.

6. The persons having or claiming an interest in the property whose names are now known are:

TRACT 309

Chester Fuller and Maxine Fuller, husband and wife

TRACT 310

Chester Fuller and Maxine Fuller, husband and wife

TRACT 200-E

Centroid Consolidated Mines, an Arizona corporation

TRACT 201-E

Stella D. Windham

The Merchants National Bank of Mobile, as trustee under the will of Stella Wilson Drake

First National Bank of Mobile, as trustee under the will of Jex H. Luce

Annie Meaher Hill

Helen R. Mealer, as trustee under the will of Augustine Mealer

Helen Mealer Sims

Augustine Meaher, Sr.

Dudley E. Hemphill, for the Estate of J. M. Hemphill, deceased

7. The State of Arizona and the Counties of Yuma and Mohave, Arizona, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners."

WHEREFORE the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

EDWARD E. DAVIS
United States Attorney

/s/ Richard S. Allemann
RICHARD S. ALLEMANN
Assistant United States Attorney
5000 Federal Building
Phoenix, Arizona 85025

Trial by jury of the issue of just compensation is demanded by plaintiff.

EXHIBIT A

TRACT 309

The Northwest one-quarter and the South one-half of Section 9, the North one-half of the Southwest one-quarter, the Southeast one-quarter of the Southwest one-quarter, and the Southwest one-quarter of the Southeast one-quarter of Section 10, and the North one-half of the Northwest one-quarter of Section 15, all in Township 11 North, Range 12 West, Gila and Salt River Meridian, in the Counties of Yuma and Mohave, State of Arizona.

Containing 720.00 acres, more or less.

TRACT 310

The East one-half of the Northwest one-quarter, the South one-half of the Northeast one-quarter, and the Northeast one-quarter of the Southeast one-quarter of Section 14, Township 11 North, Range 12 West, Gila and Salt River Meridian, in Counties of Yuma and Mohave, State of Arizona.

Containing 200.00 acres, more or less.

TRACT 200-E

Those portions of Hancock No. 1, Hancock No. 3, Hancock No. 4, Black Hawk No. 1, Black Hawk No. 3, and Centroid No. 15, lode mining claims, in the Ellsworth Mining District, Yuma County, Arizona, as shown on Mineral Survey No. 4344 on file in the Bureau of Land Management located in approximately Sections 7 and 18, Township 7 North, Range 12 West, Gila and Salt River Meridian, lying within a strip of land of various widths, being 55 feet on the right or Northeasterly side and 50 feet on the left or southwesterly side of a survey line between Survey Stations 447+67.40 and 490+00, as hereinafter designated and being 50 feet on the right or Northeasterly side and 60 feet on the left or Southwesterly side of said survey line between said Station 490+00 and Station 508+48.96 (back)=508+49.60 (ahead), basis of bearings for said survey line being the Transverse Mercator Grid, West Zone, Arizona:

Commencing at a point in the South line of said Section 18 (being Survey Station 447+6740) distant North 89°

54′ 49″ East 634.91 feet from the South ¼ corner of said section; thence along said survey line North 19° 26′ 38″ West 1801.00 feet, more or less, to the TRUE POINT OF BEGINNING in the Southeasterly line of said lode mining claim, Hancock No. 3, said true point of beginning being 109.34 feet, more or less, Southwesterly of the most Easterly corner of said mining claim; thence continuing North 19° 26′ 38″ West 472.71 feet, more or less, to a point distant North 19° 26′ 38″ West 2273.71 feet from the point of commencement, last said point being Survey Station 470 +41.11 and being the beginning of a tangent curve concave Southwesterly, having a radius of 1500 feet; thence Northwesterly along said curve, through a central angle of 14° 21′ 23″ a distance of 375.84 feet; thence North 33° 48′ 01″ West 1232.71 feet to the beginning of a tangent curve concave Southwesterly, having a radius of 1000 feet; thence Northwesterly along last said curve through a central angle of 10° 01′ 30″ a distance of 174.97 feet; thence tangent to last said curve North 43° 49′ 31″ West 175.37 feet to said Survey Station 490+00; thence continuing North 43° 49′ 31″ West 138.56 feet to the beginning of a tangent curve concave Northeasterly, having a radius of 5000 feet; thence Northwesterly along said curve through a central angle of 6° 10′ 30″ a distance of 538.87 feet; thence North 37° 39′ 01″ West 470.83 feet to the beginning of a tangent curve concave Southwesterly, having a radius of 3000 feet; thence Northwesterly along said curve through a central angle of 5° 42′ 34″ a distance of 298.95 feet; thence North 43° 21′ 35″ West 102.80 feet to the beginning of a tangent curve concave Northeasterly, having a radius of 3000 feet and a total central angle of 5° 42′ 34″ and a total length of 298.95 feet; thence Northwesterly along said curve 192.93 feet, more or less, to the intersection with the Northwesterly line of said Centroid No. 15, said intersection being distant 56.86 feet from the most Westerly corner of said mining claim; thence continuing Northwesterly along said curve 106.02 feet, more or less, to the end thereof at said Survey Station 508+48.96 (back)=508+49.60 (ahead); thence North 37° 39′ 01″ West 254.70 feet to a point in the West line of said Section 7, distant North 0° 04′ 32″ West 98.84 feet from the Southwest corner of said Section 7.

Containing 10.26 acres, more or less.

TRACT 201-E

Those portions of OLD TIMER, shown on Mineral Survey No. 3529; WISCONSIN, shown on Mineral Survey No. 3530; BUCK, RED ROSE and LITTLE GEM No. 1, shown on Mineral Survey No. 3631; ALABAMA and CHOCTAW, shown on Mineral Survey No. 3984, all being lode mining claims, in the Ellsworth Mining District, Yuma County, Arizona, as shown on the said mineral surveys on file in the Bureau of Land Management, and located in approximately Sections 7 and 18, Township 7 North, Range 12 West and Sections 12 and 13, Township 7 North, Range 13 West, Gila and Salt River Meridian, within a strip of land, 110 feet in width, lying 60 feet on the left or Southwesterly side and 50 feet on the right or Northeasterly side of a survey line described as follows, basis of bearings of said line being the Transverse Mercator Grid, West Zone, Arizona:

Commencing at the Section corner common to said above-mentioned sections; thence South 39° 07′ 24″ East 269.0 feet, more or less, to the most Westerly corner of CENTROID No. FIFTEEN, a patented mining claim, as shown on the Plat of Mineral Survey No. 4344, on file in the Bureau of Land Management; thence Northeasterly 56.86 feet, more or less, along the Northwesterly line of last said mining claim and along the Southeasterly line of said BUCK claim the TRUE POINT OF BEGINNING, said true point of beginning being Survey Station 507+42.94 and being in a curve concave Northeasterly, having a radius of 3000.00 feet; thence Northwesterly along said curve 106.02 feet to the end thereof at Survey Station 508+48.96 (back)=508+49.60 (ahead); thence tangent to said curve North 37° 39′ 01″ West 254.70 feet to a point in the line common to said Sections 7 and 12; North 0° 04′ 32″ West 98.84 feet from said common section corner; thence continuing North 37° 39′ 01″ West 2244.18 feet to the intersection with the Northerly line of said LITTLE GEM No. 1, said intersection being Easterly 628.86 feet from the Northwest corner of last said claim; thence continuing North 37° 39′ 01″ West 1098.05 feet, more or less, to the point of ending in the Northwesterly line of said ALABAMA claim, said point of ending being 87.04 feet, more or less, Northeasterly from the most Westerly corner of ALABAMA.

Containing 9.36 acres, more or less.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, MORE OR LESS, SITUATE IN YUMA AND MOHAVE COUNTIES, STATE OF ARIZONA, AND CHESTER FULLER, ET AL., DEFENDANTS	Declaration of Taking Civil No. 6471-Phx.

[Filed Sep. 29, 1967, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

To THE HONORABLE,
THE UNITED STATES DISTRICT COURT:

I, DAVID E. MCGIFFERT, Acting Secretary of the Army of the United States of America, do hereby declare that:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591) and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which authorize the acquisition of land for flood control projects; the Act of Congress approved December 22, 1944 (Public Law 534-78th Congress), which act authorizes the construction of Alamo Reservoir-Bill Williams River, Arizona, Colorado River Basin; and the Act of Congress approved October 15, 1966 (Public Law 89-689), which appropriated funds for such purposes.

(b) The public uses for which said land is taken are as follows: The said land is necessary to adequately provide for the control of flood waters from the Bill Williams River and its tributaries and for other uses incident thereto.

The said land has been selected by me for acquisition by the United States for use in connection with the establishment of a flood control dam and reservoir at the Alamo site on the Bill Williams River, Arizona, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same land described in the complaint in the above entitled cause.

3. The estates taken for said public uses are:

a. The fee simple title to Tracts Nos. 309 and 310 subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

b. A perpetual and assignable easement and right-of-way in, on, over, and across Tracts Nos. 200-E and 201-E, for the location, construction, operation, maintenance, alteration, and replacenent of a road and appurtenances thereto; together with the right to trim, cut, fell, and remove therefrom all trees, underbrush, obstructions, and other vegetation, structures or obstacles within the limits of the right-of-way; reserving, however, to the owners, their heirs, successors and assigns, the right to use the surface of the land as access to their adjoining land; subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

4. Plans showing the land taken are annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon, and all appurtenances thereto and including any and all interests hereby taken in said land, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the registry of the said court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

IN WITNESS WHEREOF, the United States of America, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said DAVID E. MCGIFFERT, Acting Secretary of the Army, this 4th day

of August, A.D. 1967, in the City of Washington, District of Columbia.

/s/ David E. McGiffert
Acting Secretary of the Army

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; CHESTER FULLER, et al., and UNKNOWN OWNERS, DEFENDANTS.	No. Civ. 6471-Phx. Order For Delivery of Possession

[Filed Sep. 29, 1967, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

This action coming on for hearing ex parte upon motion of plaintiff for an order for the surrender of possession of the property described in the Complaint in Condemnation filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of the said property,

It is this 29th day of September, 1967, adjudged that all defendants to this action and all persons in possession or control of the property described in the Complaint in Condemnation filed herein shall surrender possession of the said property, to the extent of the estate being condemned, to plaintiff immediately; provided that a copy of this order shall be served upon all persons in possession or control of the said property forthwith.

/s/ Walter E. Craig
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; et al., DEFENDANTS.	No. Civ. 6471 Phx. Entry of Appearance

[Filed Oct. 18, 1967, WM. H. LOVELESS, *Clerk,* United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

COME Now Chester Fuller and Maxine Fuller, husband and wife, and enter their appearance in the above entitled and numbered cause and request copies of all orders, notices and other pleadings in said cause.

DATED this 18th day of October, 1967.

SNELL & WILMER
By Mark Wilmer
MARK WILMER
Attorneys for said defendants
400 Security Building
Phoenix, Arizona 85004

COPY mailed this 18th day of October, 1967 to:

EDWARD E. DAVIS
United States Attorney

RICHARD S. ALLEMANN
Assistant U.S. Attorney
5000 Federal Building
Phoenix, Arizona 85025
Attorneys for Plaintiff

/s/ Mark Wilmer
MARK WILMER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
PLAINTIFF,

VS.

939.62 ACRES OF LAND, etc. et al.,
DEFENDANTS.

[Filed May 27, 1968, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, *Deputy Clerk*]

At a pretrial conference in the above entitled cause the parties raised the issue as to the appropriate method of valuation of the lands to be condemned. It is the government's position that, in determining the fair market value of the lands to be condemned and in determining the highest and best use to which the lands may be put presently and in the reasonable foreseeable future, no consideration should be given to the use to which the lands might be put in conjunction with other adjacent lands covered by state leases and federal grazing permits. It is the contention of the defendants, owners of the condemned lands, that, in determining the fair market value, the highest and best use to which the lands might be put are that of a cattle ranch, and therefore the use of the condemned lands in conjunction with adjacent federal grazing lands to which defendants have access, and state leases to which the defendants have access should be considered in the determination of the fair market value and the highest and best use.

Each of the parties has submitted memorandum in support of their respective positions. The Court being fully advised in the premises finds:

1. That in the determination of the fair market value of the premises in question the highest and most profitable use to which the lands might be put must be determined.

If the highest and most profitable use to which the lands might be put is determined to be in connection with a cattle operation, then in that event the use of the lands

in connection with adjacent public lands to which the defendant owners have access by way of federal permits or state leases shall be considered, provided consideration is also given to the possibility that the grazing permits or state leases might be withdrawn or canceled at any time without constitutional obligation to pay compensation therefor. *U.S.* v. *Jaramillo,* 190 F.2d 300.

IT IS SO ORDERED.

2. Defendants contend that it is appropriate to consolidate the above entitled cause with cause No. Civ-6005 Phx., United States v. 2562.92 Acres of Land, etc., et al., involving a leasehold interest in the State of Arizona, currently held by defendants along with other lands. The Court is of the opinion that, while it might be appropriate, it is not necessary to the determination of the issues in the above entitled cause that cause No. Civ-6005 Phx. be consolidated for trial. The motion to consolidate is therefore denied.

IT IS SO ORDERED.

DONE at Phoenix, Arizona, this 24th day of May, 1968.

/s/ Walter E. Craig
United States District Judge

Copies mailed to:
United States Attorney
FRANK HAZE BURCH, Esquire

[12] We will show you that once this land has been taken from him, he can no longer operate this ranch as an economic unit. I don't want to go into what an economic unit is. You will hear that term many times from many of the witnesses that are going to testify here.

* * * * *

[15] You will be told that this ranch can only support a steer-type operation without the deeded land that Mr. Fuller owns. In other words, if this deeded land were not there, all this land could hold would be to graze steer on a basis which would not be a consistent basis, a very inconsistent basis.

You will be told also, ladies and gentlemen, that this area which is being taken from Mr. and Mrs. Fuller is a very unique area. It has a very unique water supply. There is an abundance of water in this area. As a matter of fact, on this piece of land which I am pointing to, the smaller of the two pieces, you will be told that there is an artesian spring, a spring capable of producing 1200 gallons of water per minute without the necessity of putting a pump on it; that this artesian spring was probably created by forces in the earth years and centuries ago, many millions of years ago; and that in addition to the artesian spring, the Santa Maria River provides an underground area of water availability that is unique in Arizona and unique in Yuma County.

You will be told that this particular area has a high and best use to stabilize a cow-calf type operation. You will hear that word "stability," "stabilize," and "cow-calf type operation." You will be told that this area, by using the natural terrain and by using the water that is [16] available in abundance, is capable of producing a range of bermuda and alfalfa grass for the grazing of a cow-calf type operation.

You will be told that the highest and best for this land is the very use that Chester Fuller put it to and the very use which he intended putting to it throughout his development stage. The development stage of this thing, of course, you will be told, stopped sometime before 1967 when Chet Fuller realized that he could get no more money to continue

the development of this area, because the Government had announced to the State Land Department and to others that they were going to take this area. So the area that I am pointing to here, as far as Chet Fuller was concerned, back around 1964 or '65, became an area which could sustain a cow-calf type operation but that he could not further develop because of the Government's threat of seizure because of the Alamo Dam.

Now, you will hear me question witnesses and Mr. Allemann question witnesses about: "Mr. So and So, what is the highest and best use of this ground?" Every witness that we will bring before you will tell you that the highest and best use for this ground and the purpose for which it is best suited is to maintain and stabilize a cow-calf type operation and to use it to supplement the range which is naturally there and which Mr. Fuller can have complete use and [17] freedom to use under his permits with the Federal Government and with the State Government.

You will be told that this particular area here is capable of sustaining anywhere from 900 to 1200 cow units on a year-round basis.

Now I come to another term. You are going to hear a great many terms here and it might be a bit difficult for you to comprehend them, but I want to bring this to your attention, so that when you hear this term you will listen carefully.

A "cow unit" is not a cow. A cow unit is defined as a mother cow and its calf, a calf by its side for a one-year period of time. That is a cow unit, very briefly and very generally. There are other ways of getting cow units.

You will also hear the term "animal unit." An "animal unit" very briefly is a thousand-pound animal, whether it be a dry cow or a steer; that is an animal unit.

Now, you will be told that this area is capable of sustaining anywhere from 900—the opinions vary—anywhere from 900 to 1200 cow units per year, and that with the availability and accessibility of the federal and state ranges it really makes this a stable type cow-calf operation.

You will also be told that even without the federal and state ranges, that the area involved is a stable [18] cow-calf type operation.

You will be told that the water in abundance and the favorable climate of Yuma County, lending itself to a good growing season, makes this a very unique cow-calf type

operation. This is what Chet Fuller had. This is what was taken from him, you will be told.

Now, among the things you will hear is another term called "comparables." People value land by going out and looking at other land of the same type and general quality or the same type of carrying capacity. That term means simply how many cow units or how many animal units will land hold, what is the carrying capacity of it. And so some of these appraisers will go out and tell you, "Well, we have checked the market on this particular type ranch and we believe that it compares favorably with this ranch over here," or "We believe that we have looked at another ranch and they want so many dollars per cow unit, and we believe that Mr. Fuller's ranch is worth more than that," or "We believe that it's worth less than that." And so you will get a variety of opinions with respect to the value of the carrying capacity of the cow units on Mr. Fuller's ranch. Very generally, though, however, you will get valuations on the value of a cow unit running anywhere from $800 a cow unit to $1000 a cow unit.

* * * * *

[20] on them at all, although some of the witnesses believe that these areas also could be developed.

The little area up in the middle with the initials "PS" in it simply is a 40-acre piece of land which the Government owns. The "PS" stands for "power site." Evidently the Government at some point of time before Chet bought the ranch, or maybe sometime during the purchase of it, withheld 40 acres of this land for a power site location.

That generally is the type of evidence that I think you will hear from the witness stand about categorizing this land.

You will be told that because of the taking, ladies and gentlemen, Chet Fuller and his wife can no longer maintain an economic cow-calf type operation. You will be told what the value of the remaining land is now after taking of the deeded land, and at that point you will be given by various people their appraisals of what they believe the damages are that have been sustained by Mr. Fuller.

So that you might have a bird's-eye view of what some of the witnesses will testify relative to damages, let me tell you that the damages which we believe we can show are going to range anywhere from estimates of $682,000

to $890,000. This is going to be shown to you by four or five different people, including Mr. Fuller, people that are schooled in this, people that have appraised this particular property.

FOR THE LANDOWNER—PERCY E. COE: DIRECT

[31] Q What did you find the total deeded acreage to be that was within the area that is being taken by the United States Government?

A 920 acres.

• • • • •

REDIRECT

[135] Q (By MR. CRACCHIOLO) Let me ask you this:

Mr. Allemann asked you on cross-examination with reference to feasibility of use. Do you have an opinion as to whether or not this land is feasible to use with the expenditure of $30,000?

A Yes, I do.

Q What is your opinion?

A My opinion is that it is feasible.

Q Mr. Coe, you have worked in the State of Arizona for many years in this particular area of reclamation, have you not?

A Yes, I have.

Q Can you give the jury a comparable area of deeded land which has the abundance of water that this land has?

A It would be difficult. This is rather unique. I wouldn't want to say there were no other areas in Arizona. There are possibly some down around Nogales on Sonoita Creek and Arivaca Creek. That would be about all that I know of.

Q This has been your work for how long, Mr. Coe?

A I suppose you might say since 1940.

Q Have you ever found an area that has the abundant water supply and accessibility of land for cultivation [136] that this does?

A I can't think of any, no.

Q In coming to the conclusion that this land is feasible for use, sir, and in taking into consideration the abundance of water and type of soil that surrounds this particular area, did you take these matters into consideration when you capitalized the value of water to Mr. Fuller yesterday?

A Yes, I did.

Q And is that the reason you capitalized that on a fifty-year basis?

A That, plus the fact that the water supply is available for fifty years.

Q I see. Do you feel that the water supply would be available in this area for at least fifty years?

A Yes, I do.

FOR THE LANDOWNER—LAWRENCE S. PERRY: DIRECT

[173] I collected information that led me to believe that the best use for this property would be to take advantage of the very, very abundant water supply down there that's available at low cost and use it for the purpose that it has been used for, as a cattle ranch. And more specifically, that land that could be irrigated and kept in feed most year-round as a year-round cattle ranch.

• • • • •

[178] A My opinion is that the highest and best use was as a year-round cattle ranch, utilizing the abundant water, low-priced irrigation, and combining with it seasonal use of the higher desert lands when nature provided a supply of forage on those lands.

Q What type of cattle ranch operation?

• • • • •

[179] I felt that as far as holding it for future price rises, well, this doesn't require any positive action. You have the land. Practically every ranch in Arizona has this use built right into it, if development eventually catches you. But, in the meantime, that the productive use of this land would be the most logical use and would bring the most return to the owner would be in the form of a year-round cow and calf ranch.

THE COURT: That, I take it, was because of its location, availability of water, nature of the terrain, the fact that the elevation was such that it could grow enough feed to hold "X" number of cattle.

THE WITNESS: Yes, sir. It has the capability of growing good, highly nutritious feed without excessive costs, and it is well suited for this type of an operation.

THE COURT: And moreover, it had been used for that?

THE WITNESS: Yes, sir, that is true.

THE COURT: Very well. Go ahead.

Q (By MR. CRACCHIOLO) What do you mean by "cow-calf operation," sir?

A Well, I use this term to differentiate a type of ranch. In other words, a cow-calf operation is a ranch on which you maintain a herd of adult cattle, of cows and bulls. And you sell the increase, the calves. This differentiates it from what is commonly called a steer operation, which is [180] generally a seasonal operation in which perhaps you only have winter feed or summer feed, depending on what part of the state you may be in. And you put young livestock on this seasonal forage for a period of weeks or months and then sell them off.

Q Mr. Perry, taking away the deeded land, all of the deeded land of Mr. Fuller—this isn't being taken away, but for the moment we take all of the deeded land away from Mr. Fuller—what use would this property have?

MR. ALLEMANN: I fail to see the materiality. That is not the situation here. I don't know where we are going by this.

THE COURT: Oh, I suppose it is for illustration.

MR. CRACCHIOLO: Just for illustration.

THE COURT: Overruled.

Q (By MR. CRACCHIOLO) What availability would you have?

A It would be available for a seasonal steer use on those years when nature provided enough rain to make feed down there on the desert which could be used for that purpose.

Q Would it have a dependable carrying capacity for steers?

A Oh, no, sir. There might be years when you could put—I won't say zero, because probably a few could—but a very limited number of cattle on there.

* * * * *

[183] revocation at any time without compensation, as well as the Taylor grazing lease?

THE WITNESS: Yes, sir. I considered that fact.

THE COURT: This is not unusual in cattle operations in Arizona?

THE WITNESS: No, sir. I used sales of properties that had varying amounts of public lands that would be subject to this very same hazard.

THE COURT: Very well.

Q (By MR. CRACCHIOLO) What were the factors, Mr. Perry, that you took into consideration in arriving at that price in the before situation, taking into consideration that the state leases and federal Taylor grazing leases are subject to revocation?

A Well, some of the many factors I took into account were the carrying capacity of this ranch.

Q Let me get up here, so that we can mark these down. Go ahead.

A The carrying capacity of the ranch, the abundant water supply, the ability to produce a good quantity of the high quality forage—the word I like to use is "balance"—the availability and accessibility and stability that is given to this ranch by the presence of the public lands.

[184] Q You used the word "stability"?

A Stability, yes, sir.

Q In what type of context? Stability in what?

A In this sense, that a ranch which has the ability to carry a breeding herd of cows year-round and has in addition the possibility of being able to carry the calves to a little greater weight and little greater age, put—what in ranch terminology is called "put a cheap gain on them." After all, the rancher's product is calves, a beef—he is running a beef factory.

Q Would the words "stability of cow operation" suffice——

A Yes, that would condense it down.

• • • • • •

[193] Did you at any time in your calculations to come to the value after this deeded land has been taken, ever take into consideration any monetary compensation for the loss of cow units by loss of the cow units by virtue of the public domain?

A Well, mathematically it was here and I set it out in my report as what I called a non-compensable item. I appraised the property before, I appraised the property after, and I broke the difference down into the value of what was taken from the deeded, the value of the loss of the

public as a separate non-compensable item, and the residue of this difference was what I considered severance to the remainder.

Q You did that in considering the value after the deeded land was taken, didn't you?

A Yes.

Q Precisely, here is what I want to get at:

The $1,150,000 includes the cow units in the public domain, doesn't it?

A Yes, it does.

• • • • •

[263] THE WITNESS: He has 360.

THE COURT: Tell me this, Mr. Perry:

The deeded lands originally are in about three different parcels, aren't they?

THE WITNESS: Yes, sir, they are. In the aerial photograph on the right-hand side there is a parcel outlined in yellow.

THE COURT: Yes. And two others?

THE WITNESS: Yes, sir.

THE COURT: Would you consider any single parcel an economic unit by itself?

THE WITNESS: It would be very difficult to consider that it would be. The one that would have the most possibility of being, sir, would be that Three Rivers parcel, the biggest one furthest to the west.

And if I may indulge your time for just a moment, I think I have a better answer to that.

(Pause.)

I believe that we could consider the Three Rivers parcel to be pretty close to an economic unit all by itself, assuming that you were able to tie the water together, and so forth.

THE COURT: When you refer to it as an economic unit, would you still consider its highest and best use to be that as a base for a cattle operation?

[264] THE WITNESS: Yes, sir.

THE COURT: So you keep in mind the necessity of using it in connection with public lands that were adjacent and accessible?

THE WITNESS: Yes, sir. There again, these public lands

give it the balance that most typical ranchers are interested in having.

THE COURT: I see. Go ahead.

• • • • •

[329] Q And you told us that the ranch had a 1200 animal unit capacity?

A 1200 cow unit capacity.

Q 1200 cow unit capacity.

You mean then these three parcels, did you not?

A Those three parcels in combination with the public land.

Q In combination with the public land?

A Yes, sir.

• • • • •

[333] Then, getting to the cow unit figure from there was a matter of dividing the cow units into the $1,150,000, and it comes out to be $899.58 per cow unit.

Q Where did you get your 1200 cow units?

A I estimated this on the basis of land that as of my inspection was either irrigated or with very little rehabilitation could be put into irrigation, or with very, very little additional development, in some cases less than the rehabilitation, could be put into irrigation.

And then, taking that land, figuring that approximately ten per cent of it would have to be set aside to grow winter feed on, and estimating that on the balance, under proper management, with adequate water and by the addition of fertilizer, and by the use of the fringe lands when feed is available—and by the "fringe lands," we have kind of ignored it as part of the property, and namely the deeded land that isn't under irrigation, the boundaries, the borders, we'll say, and the river bed, and so on—that we could carry two cow units per irrigated acre of bermuda grass, and as I say, by using part of the irrigated acres, set aside for a winter feed program.

• • • • •

[340] Q Prior to that you had subtracted the desert, the value of the carrying capacity of the Taylor grazing land, from $1,150,000, and got $1,067,500, didn't you?

You can understand my——

A I don't recall making that computation, sir, but I think I probably did the same thing, in effect, when I broke down the difference between before and after. But would you give me the figures again?

Q That's all right. My notes may be bad.

In any event, to support your opinion of valuation of both before and after, Mr. Perry, it is necessary, many things are necessary, that your comparables reflect an accurate before value of the ranch, that the carrying capacity is in fact 1200 units, that there is in fact the economically developed land that you have told us you thought it was, and that the value per cow unit is what you arrived at in order to come to your figure; is that not correct?

A Yes.

* * * * *

[418] "Q Let me ask you this: do you have an opinion as to whether or not this is a good area for underground water supply, irrespective of what you saw on April 15th and April 25th?

"A It is a good area. There is water there and the lift is very small compared to other areas.

"Q When you say the lift is very small, have you done any studies with reference to the lift?

"A Well, the wells, when they were pumped at high discharge, were pumping from 25 to 30 feet beneath the surface, and I know of no place else in Arizona where you could do that.

"Q So is it a good water area?

[419] "A Yes, it is.

"MR. CRACCHIOLO: I have nothing further.

* * * * *

CHESTER FULLER LANDOWNER—DIRECT

[464] Q (By MR. BURCH) Now, Mr. Fuller, referring again only to your deeded land, let me ask you this:

You have stated, I believe, that your opinion was the highest and best use of the total Palmarita Ranch was as a mother cow operation; is that correct?

A Yes.

Q And will you review briefly for the jury the factors

that you considered this ranch had that qualified it for a mother cow operation?

A Well, it had of course the fine water and the very fine climate for growing the kind of crops that we have to have. Then, we have the soil, which is not quite so important but still is necessary.

Then we also have the availability of federal land, as well as state land.

J. N. McDougal, Agricultural Advisor for the people of Mohave County, now the University of Arizona.

[586] Q Where did most of it lie?

A Adjacent to the river or in the river bottom.

Q Now, sir, did you view this area that Mr. Fuller showed you—did you come to a conclusion as to what you could use this particular area that Mr. Fuller showed you, as to its highest and best use?

A I think that with its adjacent range land there that he is using, a cow-calf operation probably would be its highest use, pasture.

Q Why do you say that?

A Well, he needs that additional forage during the dry period on the desert.

Q When you say he needs that additional forage, what type of forage can he grow there?

A Well, at the present time he has alfalfa and bermuda grass pastures. Most any type of forage can be grown there.

Q Did you look and observe the water condition?

A I did.

Q What did you find?

A I found a water source that I don't think can be duplicated or seen anywhere else.

Q Mr. McDougal, did you look at this area which [587] surrounds this water source and observe it?

A Yes, I did.

Q I want you to assume that this area is approximately 920 acres of land. Do you have any idea as to how much of this land could be put into a forage type crop?

A Well, today, with the modern sprinkler systems, hardly any land is not accessible, as far as being irrigated.

Q What do you mean by "modern sprinkler system"?

A Well, there are so many different types of sprinkler systems, some that shoot out a hundred or so feet in distance. And you don't have to traverse them over steep land, and such as that. Where the land is level or partially level, it works better yet. But most all of that land could be irrigated with a sprinkler system.

Q What type of crop could be grown?

A Forage type crops.

Q Suitable for what type of cattle operation?

A Livestock grazing.

Q Or——

A Or for hay in the flatter area.

Q Would it be suitable in its highest and best use for a cow-calf type of operation?

A I think so, with the adjacent land that is in there.

* * * * *

[590] A I don't think that you can find a free-flowing spring anywhere in the western United States. I haven't seen it, and I have traveled quite extensively.

Q You have seen no other such spring?

A Not of its size.

FOR LANDOWNER—CLOSING ADDRESS TO JURY:

[1018] MR. CRACCHIOLO

* * * * *

And adding to the Arizona Ranch and Metals Company holdings and these little acres is like taking the heart out of this ranch. And it isn't even similar, it isn't even comparable, it isn't even in the same situation. It's like saying to a human being, "We'll remove your heart, it isn't worth very much, it's such a little organ." But it destroys the body.

INSTRUCTIONS TO JURY BY COURT

* * * * *

[1049] During the course of this trial, reference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, should you determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into con-

sideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or canceled at any time without a constitutional obligation to pay the compensation therefor.

Evidence has been introduced of defendants' use of their deeded land which is being taken, in conjunction with surrounding land owned by the United States, for which defendants have grazing permits, and land belonging to the State of Arizona, which defendants lease. In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or [1050] the State of Arizona. However, in determining the value of the fee land and in awarding compensation to the owners, you should consider the availability and accessibility of the permit and leased land and its use in conjunction with the fee land taken and give to the fee land such value as, in your judgment, according to the evidence, should be given on account of such availability and accessibility of the permit and leased land, if any. You should also consider the possibility that the permits on the United States land could be withdrawn at any time without constitutional obligation to pay compensation therefor and determine the effect you feel such possibility, according to the evidence, would have upon the value of the fee land.

GOVERNMENTS' OBJECTIONS & INSTITUTIONS

[1057] requested Instruction No. 4, with specificity to the last paragraph thereof.

The Government excepts to the refusal of the Court to give Plaintiff's requested Instruction No. 5.

The Government excepts to the modification of Plaintiff's requested Instruction No. 7 in striking out the words "nor what defendants claim it was worth to them, nor what it may be worth to the plaintiff."

The Government excepts to the refusal of the Court to give Plaintiff's requested Instruction No. 8.

The Government excepts to the modification of Plaintiff's requested Instruction No. 20 in the striking out of subsection 3 thereof, which reads: "any opportunities the land-

owners may have lost by reason of the taking of this property."

The Government excepts to the refusal of the Court to give Plaintiff's requested Instructions No. 21 and No. 22.

The Government further excepts to the giving, as modified, of Defendants' requested Instruction No. 9.

And for the record, Your Honor, we would like to reiterate our continuing objection to the allowance of testimony on a unit, considering the parcels as a unit, and considering as a unit, based upon the cases set forth in our pretrial memorandum.

JURY'S VERDICT

PRESCOTT, ARIZONA, MONDAY, JUNE 17, 1968, 10:45 O'CLOCK, P.M.

PROCEEDINGS

[1059] THE COURT: You may call the jury.

IN THE PRESENCE OF THE JURY:

THE COURT: Ladies and gentlemen, have you reached a verdict?

THE FOREMAN: Yes, Your Honor, we have.

THE COURT: You may pass it to the bailiff, please.

(Handed to the bailiff and then to the Court.)

THE COURT: You may read the verdict.

THE CLERK: (READING) "In the United States District Court for the District of Arizona, United States of America, Plaintiff, versus 939.62 acres of land, more or less, situate in Yuma and Mohave Counties, State of Arizona; Chester Fuller, et al. and unknown owners, defendants, No. Civil 6471-Phoenix, verdict:

"We, the jury, find the fair market value of and just compensation for the property and estate condemned herein, as of September 29, 1967, to be as follows:

Tract No. 309	$245,000
Tract No. 310	$105,000

"The total fair market value of and just compensation for the property and estate condemned herein, as of September 29, 1967, is:

[1060] Total $350,000.
"Dated this 17th day of June, 1968.
Laurence E. Powers, Foreman."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; CHESTER FULLER, et al., and UNKNOWN OWNERS, DEFENDANTS.	No. Civ. 6471-Phx. Judgment Tracts 309 and 310

[Filed Sept. 24, 1968, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona, by WINONA ANDRE, Deputy Clerk]

The above-entitled cause came on for jury trial before the Honorable Walter E. Craig on June 10, 1968 for the purpose of determining just compensation for the estate taken by the plaintiff in the lands designated as Tracts 309 and 310 in the Declaration of Taking filed herein, which estate was taken by the plaintiff as of September 29, 1967.

Evidence was submitted by the plaintiff and by the defendants at the conclusion of which the jury returned its verdict as follows:

"We, the Jury, find the fair market value of and just compensation for the property and estate condemned herein, as of September 29, 1967, to be as follows:

Tract No. 309	$245,000.00
Tract No. 310	$105,000.00

The total fair market value of and just compensation for the property and estate condemned herein, as of September 29, 1967, is:

Total	$350,000.00

DATED This 17 day of June, 1968.

LAWRENCE E. POWERS
Foreman"

The Court being fully advised in the premises, IT IS ORDERED, ADJUDGED AND DECREED:

1. That, the plaintiff had the right to take, and did take, as of September 29, 1967, the estate set forth and described in the Declaration of Taking and the Complaint in Condemnation, filed herein, in Tracts 309 and 310, and title thereto was thereby vested in the United States;

2. That, the just compensation for the estate taken in Tracts 309 and 310 is the sum of $350,000.00, in accordance with the verdict set forth above;

3. That, on September 29, 1967, there was deposited in the Registry of the Court the sum of $136,500.00 as estimated just compensation for Tracts 309 and 310;

4. That, on December 22, 1967 and March 4, 1968, the defendants, Chester Fuller and Maxine L. Fuller, his wife, withdrew the sum of $136,000.00 from the Registry of the Court;

5. That, the sum of $231,500.00 is the deficiency due for Tracts 309 and 310, pursuant to the verdict set forth above:

6. That, the plaintiff, United States of America, is hereby directed to pay into the Registry of the Court the sum of $213,500.00, together with interest at the rate of six percent (6%) per annum from September 29, 1967 until the date of such deposit;

7. That, the Clerk of the Court is hereby authorized and directed to pay from the deposit made in this cause into the Registry of the Court the following sum: $214,000.00, together with interest at the rate of six percent (6%) per annum on $213,500.00 from September 29, 1967, until the date of such deposit to:

Chester Fuller and Maxine L. Fuller, his wife
c/o Kramer, Roche, Burch, Streich & Cracchiolo
Attorneys at Law
567 First National Bank Building
411 North Central Avenue
Phoenix, Arizona 85004

8. That, the Court shall, and hereby does, retain juris-

diction to make and enter herein such further orders and judgments as may be necessary and proper in the premises.

DONE IN OPEN COURT this 24th day of Sept, 1968.

/s/ Walter E. Craig
United States District Judge

APPROVED AS TO FORM;
KRAMER, ROCHE, BURCH, STREICH & CRACCHIOLO
By .....
Attorneys for defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF, VS. 939.62 ACRES OF LAND, more or less, situate in Yuma and Mohave Counties, State of Arizona; CHESTER FULLER, et al., and UNKNOWN OWNERS, DEFENDANTS.	No. Civ. 6471-Phx. Notice of Appeal Tracts 309 and 310

[Filed Nov. 21, 1968, WM. H. LOVELESS, *Clerk*, United States District Court for the District of Arizona by WINONA ANDRE, *Deputy Clerk*]

NOTICE IS HEREBY GIVEN that the United States of America, plaintiff in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on September 24, 1968.

EDWARD E. DAVIS
United States Attorney

/s/ Richard S. Allemann
RICHARD S. ALLEMANN
Assistant United States Attorney

Copy hereof mailed this 21st
day of November, 1968 to:

Kramer, Roche, Burch, Streich & Cracchiolo
Attention: Mr. Frank Haze Burch
567 First National Bank Building
Phoenix, Arizona 85004

/s/Richard S. Allemann
RICHARD S. ALLEMANN
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, v. CHESTER FULLER AND MAXINE FULLER (939.62 acres of land, more or less, situated in Yuma and Mohave Counties, State of Arizona), DEFENDANTS-APPELLEES.	No. 23,932

[April 29, 1971]

Appeal from the United States District Court
for the District of Arizona

Before: ELY, WRIGHT and KILKENNY. *Circuit Judges.*
WRIGHT, *Circuit Judge*:

This is an appeal in a condemnation action from judgment entered on a jury verdict fixing $350,000 as just compensation for the taking of two tracts totalling 920 acres. This court has jurisdiction under 28 U.S.C. § 1291. On appeal by the United States, we affirm.

The land taken was used by the landowners, Mr. and Mrs. Fuller, as part of a 44,768-acre ranch operation composed of:

fee land	1,280 acres
state leased land	12,027 acres
federal domain leased under the Taylor Grazing Act (43 U.S.C. § 315b)	31,461 acres
TOTAL	44,768 acres

In 1967 the United States instituted a proceeding in eminent domain to acquire title to two parcels of the Fullers' fee land, totaling 920 acres. At no time prior to or during the pendency of the condemnation action were the Fullers' exclusive, revocable grazing permits on the public

lands revoked, nor were such lands included in the condemnation action.

It was the government's theory that in determining the fair market value of the base fee lands taken, no consideration should be given to the use to which such lands might be put in conjunction with adjacent public domain lands covered by federal grazing permits. Fuller contended, on the other hand, that since the highest and best use of his fee lands (together with state and federal leased lands) was that of a cattle ranch, the use of the leased federal public domain lands should be considered in determining the fair market value of his fee lands.

Fuller was engaged in a large-scale cattle operation known as a year-round "cow-calf" ranch, made possible because the fee lands were situated at the confluence of two rivers. Cheap water was available, and the fee lands had been cleared, cultivated and irrigated. They were planted to alfalfa and other grasses and Fuller did not have to rely on the condition of the grazing land and could graze his cattle the year round.

It was a stable and profitable operation. Without the fee lands, the only practical use would be raising steers, which would be purchased annually, fattened until the desert feed dried up and then sold.

The district court instructed the jury as follows:

> ". . . [R]eference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or cancelled at any time without a constitutional obligation to pay the compensation therefor. . . . In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or the State of Arizona."

Government witnesses fixed the value of the condemned land at $135,000. The valuation testimony of the landowners fixed it at $682,000 to $985,000. The jury awarded $350,000.

The trial court's instruction to the jury was in accord with the rule of *United States v. Jaramillo,* 190 F.2d 300 (10th Cir. 1951). In a factual situation almost identical to the case before us, the Court of Appeals for the 10th Circuit said:

> "In the judicial determination of fair value as just compensation for the land taken, the highest and most profitable use for which it is reasonably adaptable may be considered, 'not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held,' (Citations omitted.) All rights, easements and privileges appurtenant thereto should be considered in estimating its fair value or compensation to be paid, taking into account also the possibility of their being discontinued without resulting obligation." *Jaramillo* at p. 302.

Recognizing that *Jaramillo* is in point, the government submits that the rule of that case is wrong and inconsistent with that of *United States v. Rands,* 389 U.S. 121 (1967). *Rands* was a navigational servitude case. There the Court held that the compensable value of private riparian fast lands taken by the government did not include its special value as a port site since the owner had no right of access to the navigable waters which could be legally protected as against the United States.

A careful examination of the rationale of the navigational servitude cases and the federal legislation regarding grazing permits gives rise to a basis for distinguishing the cases relied upon by the government. In *Rands,* it was said:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by

Congress.' *Gilman v. Philadelphia,* 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC v. Niagara Mohawk Power Corp.,* 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. . . . Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, . . . or otherwise impair or destroy a riparian owner's access to navigable waters, . . . even though the market value of the riparian owner's land is substantially diminished." *United States v. Rands,* 389 U.S. at 122-23.

Similarly, in *United States* v. *Twin City Power Co.,* 350 U.S. 222 (1956), the dominant navigational servitude was held to entitle the government to condemn land without considering its special value as a hydroelectric site.

The government is correct in its assertion that the constitutional provision and subsequent court interpretation authorized Congress to regulate navigable streams to the total exclusion of private rights. *United States v. Rands,* 389 U.S. 121, 123. However, when Congress legislates in a manner that recognizes special rights or privileges in navigable waters, then the government is required to compensate for the destruction of such rights, notwithstanding the fact that Congress had the constitutional power to exclude private rights completely. *United States v. Twin City Power Co., supra* at 225.

A study of the Taylor Grazing Act leads to the conclusion that Congress exercised less than its constitutional power over public lands and recognized special rights against third parties and sometimes the government itself. Unlike navigational servitude, there are some private rights and privileges bestowed and protected by the Act which justify the conclusion that the uses to which federal grazing lands

are dedicated are unlike the undiminished public uses of navigable streams.

For example, the Act creates section 3 lands and section 15 lands. The latter are disconnected, non-contiguous tracts which are not contained in grazing districts. Section 3 lands, involved here, are located within grazing districts and are administered by the Secretary of the Interior through a system of preferential grazing permits. These run as long as ten years and permit holders have a preferential right to renewal. 43 U.S.C. § 315b.

Though the Act does not create any interest in the lands themselves, it does require that "grazing privileges recognized and acknowledged shall be adequately safeguarded" by the government. 43 U.S.C. § 315b. *See Red Canyon Sheep Co. v. Ickes,* 98 F.2d 308, 314 (D.C. Cir. 1938).

While grazing permits are unrevoked, neither the grantor nor third party may interfere with their exercise. In fact, the government has an affirmative obligation to safeguard them adequately. *Oman v. United States,* 179 F.2d 738 (10th Cir. 1949).

> "Other courts have held that these permits conferred rights subject to judicial protection. In Arizona the holder of similar grazing permits was said to be entitled to an action of trespass against encroaching ranchers. *Garcia v. Sumrall,* 58 Ariz. 526, 121 P.2d 640. Even the opinion of the *Osborne* case, *supra,* implied that these permits would be 'highly valuable as between private persons'. . . . In the *Red Canyon Sheep Co.* case, 98 F.2d 308, it was held that, whatever the rights accruing under the permits be denominated, they were entitled to equitable protection." *Oman* at pp. 741-42.

In *McNeil v. Seaton,* 281 F.2d 931, 934 (D.C. Cir. 1960), the court held that a new grazing district rule could not be applied to one who had obtained his permit during the first priority period established by the Act. In so holding, the court said that while the permits exist, "they are something of real value . . . which have their source in an enactment of Congress." The court concluded by saying that the permit holders can be protected against wrongful interference by the United States with the statutory rights or privileges represented by the permits.

Thus it can be seen that the government's control over

Taylor Grazing Act lands is not the same as the absolute control enjoyed under the navigational servitude.

There is another basis for distinguishing the navigational servitude cases represented by *Rands* and *Twin City*. In those cases the issue was whether the government should pay additional compensation for the theoretical value of potential uses, *i.e.*, port sites and hydroelectric operation. Actual investments had not occurred. There was no congressional policy of use and development of navigable waters as a part of private commercial enterprises.

In situations where the government has requested private investment to help develop and utilize navigable waters, then the government has had to pay the "going concern" value upon condemnation. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). In *Monongahela* the government had to pay both for locks and a dam built at the government's invitation.

The purpose of the Taylor Grazing Act was to develop and stabilize the western cattle business. By providing for regulated use and protection of grazing rights, the government helped to improve the use of the land as did the changes which effected public use of the river in *Monongahela*. The difference between our case and that is one of degree.

It was, therefore, not improper for the trial court to allow the jury to consider the conjunctive use of the fee and permit lands, so long as the jury was admonished to consider the possibility that the permits might be withdrawn at any time without compensation.

The government's remaining arguments are without merit. Some rely on cases which are distinguishable because the permits were cancelled and the holders of the permits were seeking compensation.[1] Other contentions are answered by *Jaramillo*, with which decision we are in accord.

Affirmed.

KILKENNY, Dissenting:

I believe that *United States v. Rands*, 389 U.S. 121 (1967), controls on the federal lands and that the judgment of the lower court should be reversed.

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[1] *Osborne v. United States*, 145 F.2d 892 (9th Cir. 1944). *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), *cert. den.* 393 U.S. 1121 and 395 U.S. 945. *Mollohan v. Gray*, 413 F.2d 349 (9th Cir. 1969).

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23932

UNITED STATES OF AMERICA,
APPELLANT

v.

CHESTER FULLER, ET AL. (939.62 ACRES OF LAND, MORE OR LESS, SITUATE IN YUMA AND MOHAVE COUNTIES, STATE OF ARIZONA, TRACTS 309 AND 301),
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PETITION OF THE UNITED STATES FOR REHEARING

The United States of America, appellant, presents this petition for rehearing for the reasons stated below.

1. *The majority opinion rests on a false factual and legal premise.*—In attempting to show that in federal condemnation a landowner has greater rights over public domain land held under revocable license than a riparian landowner has over a navigable river over which the United States has only a servitude, this Court wrote: "Unlike navigational servitude, there are some private rights and privileges bestowed and protected by the [Taylor Grazing] Act which justify the conclusion that the uses to which federal grazing lands are dedicated are unlike the undiminished public uses of navigable streams" (Slip Op. 4).

The Government's rights under the navigation servitude are, if anything, more restricted than its rights to its own lands covered by grazing permits. The United States does not have fee ownership of the riverbed. *Shively* v. *Bowlby*, 152 U.S. 1, 31 (1893). Fee title rests either in the state or in the riparian owner. *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 60 (1913). A riparian owner actually has

a vested right of access to navigable waters and the right to fill to the bulkhead line—rights which are servient only to the Government's navigational servitude. *United States* v. *River Rouge Co.*, 269 U.S. 411, 417 (1926). Moreover, if the United States floods fast lands above the high water mark,[1] or imposes a flowage easement over fast lands, it must pay compensation.[2]

When third parties, other than the Federal Government, interfere with lawfully placed structures in navigable streams, the owner must be paid. *Railway Company* v. *Renwick*, 102 U.S. 180 (1880); *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 99 F.2d 902 (C.A. 9, 1938), cert. den., 305 U.S. 660; *Great Northern Ry. Co.* v. *Washington Electric Co.*, 197 Wash. 627, 86 P.2d 208, 217 (1939); cf. *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 70 (1913).

The majority opinion likewise errs in limiting the Government's navigation servitude to "the theoretical value of potential uses" (Slip Op. 5). While *United States* v. *Rands*, 389 U.S. 121 (1967), involved a potential port site and *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1950), involved a potential hydroelectric site, the bases of those opinions is not potential uses. The crux of the navigation servitude cases is that where the Government appropriates the flow of navigable waters under the Commerce Clause, it is "beholden to no one." *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 233 (1960). Riparian owners have many times sustained substantial *actual* loss for which the Fifth Amendment has required no compensation. The United States is not chargeable under the Fifth Amendment when it orders removal of a wharf, *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251 (1915), or when it requires removal or alteration of a bridge constructed pursuant to a general act of Congress which necessarily contemplated a large investment of private capital. *Louisville Bridge Co.* v. *United States*, 242 U.S. 409, 420 (1917). Thus, in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 92 (1941), the United States was not liable for damage to railroad tracks located between high- and low-water marks caused

[1] *United States* v. *Willow River Co.*, 324 U.S. 499, 509 (1945).

[2] *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 627 (1961).

by the raising of the level of the Mississippi River up to ordinary high-water mark. The Supreme Court explained (at 599) that any structure placed in the bed of a navigable river is subject to the risk of injury or destruction without compensation. Accord: *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 70 (1913).

In *United States* v. *531.13 Acres of Land, etc.*, 366 F.2d 915 (C.A. 4, 1966), cert. den., *sub nom. Duke Power Co.* v. *United States*, 385 U.S. 1025, a Rule 71A(h) commission made an award to the Duke Power Company of $500,000 as the fair value of hydroelectric facilities. This award was reversed because this component was not compensable.

In condemnation the Fifth Amendment requires the United States to pay only for the taking of vested property rights, "not for opportunities which the owner may lose." *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282 (1943). Accordingly, many items of value are not compensable: frustrated business opportunities, *Omnia Co.* v. *United States*, 261 U.S. 502 (1923); consequential destruction of a business, *Mitchell* v. *United States*, 267 U.S. 341 (1925). The Supreme Court has repeatedly recognized that the "existence of value alone does not generate interests protected by the Constitution against diminution by the Government * * *." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932). Similarly, a lessee's mere expectancy of renewal is not a property interest. *United States* v. *Scully*, 409 F.2d 1061 (C.A. 10, 1969), cert. den., 396 U.S. 876, nor is a tenancy that is cut short by a termination-by-condemnation clause. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 380 (1946). Nor can a claimant recover for the taking of lands in which he has no estate or interest. *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172, 175 (C.A. 9, 1950), cert. den., 340 U.S. 820.

The majority opinion's observation that the difference between this case and *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), is "one of degree" does not support the result here and is at variance with the Supreme Court's and this Court's subsequent explanation of that case.[3] *Monongahela* involved condemnation of franchises and physical assets constructed at the instance and

[3] The Supreme Court has subsequently explained that *Monongahela* rests "primarily upon the doctrine of estoppel," *Omnia Co.* v. *United States*, 261 U.S. 502, 513-514 (1923); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S.

implied invitation of Congress. There is no such invitation here.

In suggesting that livestock operations were invited to improve the public lands by the enactment of the Taylor Grazing Act, the majority has chosen to ignore the fact that such grazing at bargain rates represents a subsidy to the industry. See *Pankey Land & Cattle Company* v. *Hardin*, 427 F.2d 43 (C.A. 10, 1970).

In short, there are many instances where valuable rights, good against the rest of the world, are not compensable when disturbed or destroyed by the sovereign in the exercise of its eminent domain powers. That point was clearly expressed by this Court in *Osborne* v. *United States*, 145 F.2d 892, 896 n. 5 (1944):

> Numerous instances are to be found where permits issued by a sovereign are highly valuable as between private persons but which may be revoked by the sovereign without the payment of compensation: e.g. bridge franchises, Louisiana Bridge Co. v. United States, 1917, 242 U.S. 409, 37 S.Ct. 158, 61 L.Ed. 395; United States v. Wauna Toll Bridge Co., 1942, 9 Cir., 130 F.2d 855; licenses to erect river and harbor structures, United States v. Chicago, M., St. P. & P. R. Co., 1941, 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064; Willink v. United States, 1916, 240 U.S. 572, 36 S.Ct. 422, 60 L.Ed. 808; Greenleaf Johnson Lumber Co. v. Garrison, 1915, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; United States v. Chandler-Dunbar Water Power Co., 1913, 229 U.S. 53, 70, 33 S.Ct. 667, 57 L.Ed. 1063; Berger v. Ohlson, 1941, 9 Cir., 120 F.2d 56; permits to erect and maintain telephone and power lines, Swendig v. Washington Co., 1924, 265 U.S. 322, 44 S.Ct. 496, 68 L.Ed. 1036; United States v. Colorado Power Co., 1916, 8 Cir., 240 F.2d 217, 220; licenses to occupy, lease, or sell fishing areas, Lewis Blue Point Oyster Cultivation Co. v. Briggs, 1913, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083.

The Government's navigation easement means only that ie flow of a navigable stream is "in no sense private propty." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 5 (1913).

, 281 (1943); *United States* v. *Rands*, 389 U.S. 121, 126 (1970); see also *ited States* v. *87.30 Acres of Land, Etc., State of Washington*, 430 F.2d 0 (C.A. 9, 1970).

EDMUND B. CLARK,
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JUNE 1971

Docketed

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jun. 23, 1971, Wm. B. Luck, *Clerk*]

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CHESTER FULLER and MAXINE FULLER (939.62 acres of land, more or less, situated in Yuma and Mohave Counties, State of Arizona), Defendants-Appellees.	No. 23,932 ORDER

Before: ELY, WRIGHT and KILKENNY.

The Petition for Rehearing, having been duly considered, is denied. Judge Kilkenny would grant the Petition for Rehearing.

DATED:

SUPREME COURT OF THE UNITED STATES

No. 71-559

UNITED STATES,
PETITIONER,

v.

CHESTER FULLER, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 17, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U.S. Government Printing Office: 1972—457-455/502

INDEX

	Page
nion below	1
diction	1
tion presented	2
ute involved	2
ement	2
ons for granting the writ	4
clusion	10
endix A	11
endix B	19
endix C	20

CITATIONS

s:	
Acton v. *United States*, 401 F.2d 896, certiorari denied, 393 U.S. 1121, 395 U.S. 945	6
Boom Co. v. *Patterson*, 98 U.S. 403	7
Ford & Son v. *Little Falls Co.*, 280 U.S. 369	7
Gilman v. *Philadelphia*, 3 Wall. 713	7
Mollohan v. *Gray*, 413 F.2d 349	6
Osborne v. *United States*, 145 F.2d 892	6
Reichelderfer v. *Quinn*, 287 U.S. 315	5
Shively v. *Bowlby*, 152 U.S. 1	7
Shoemaker v. *United States*, 147 U.S. 282	5
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53	7
United States v. *Cors*, 337 U.S. 325	5
United States v. *Cox*, 190 F.2d 293, certiorari denied, 342 U.S. 867	6, 8, 9
United States v. *85,237 Acres of Land, etc., in Zapata County, Texas*, 157 F. Supp. 150, affirmed, 252 F. 2d 116	9
United States v. *87.30 Acres in State of Washington* (*Stueckle*), 430 F. 2d 1130	6

447-348—71——1

Cases—Continued
United States v. *531.13 Acres of Land, Etc.*, (*Duke Power Co.*), 366 F. 2d 915, certiorari denied, 385 U.S. 1025 — Page 8
United States v. *Grand River Dam Authority*, 363 U.S. 229 — 7
United States v. *Honolulu Plantation Co.*, 182 F. 2d 172, certiorari denied, 340 U.S. 820 — 6
United States v. *Jaramillo*, 190 F. 2d 300 — 8, 9
United States v. *Miller*, 317 U.S. 369 — 5
United States v. *Petty Motor Co.*, 327 U.S. 372 — 6
United States v. *Rands*, 389 U.S. 121 — 3, 4, 7, 8
United States v. *Reynolds*, 387 U.S. 14 — 5
United States v. *River Rouge Co.*, 269 U.S. 411 — 8
United States v. *677.50 Acres in Marion County, Kan.* (*Clear Creek*), 420 F. 2d 1136, certiorari denied, 398 U.S. 928 — 6
United States v. *6,404.19 Acres in Phillips County, Mont.* (*Lock*) (D. Mont., Civil No. 2776), decided September 3, 1971, appeal pending — 5
United States v. *Willow River Co.*, 324 U.S. 499 — 7
United States ex rel. T.V.A. v. *Powelson*, 319 U.S. 266 — 6
Constitution and statutes:
United States Constitution:
Commerce Clause, Article I, Section 8 — 7
Fifth Amendment — 5, 6
P.L. 534, 78th Cong — 3
Taylor Grazing Act, 48 Stat. 1270, Section 3, as amended, 43 U.S.C. 315b — 2, 4, 6
Act of July 9, 1942, 56 Stat. 654, as amended, 43 U.S.C. 315q — 6
33 U.S.C. 701 — 2
40 U.S.C. 258a — 2
Miscellaneous:
Public Land Statistics, 1970, U.S. Department of the Interior, Bureau of Land Management — 4

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (App. A, *infra*) is reported at 442 F. 2d 504.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on April 29, 1971. A timely petition for rehearing was denied on June 23, 1971 (App. C, *infra*). On September 16, 1971, Mr. Justice Douglas

extended the time for filing a petition for a writ of certiorari to and including October 21, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the owner of land taken by the United States is entitled to have included in the measure of his compensation the value of revocable grazing permits on adjoining federal land even though Congress specified that such grazing permits create no "right, title, interest, or estate in or to the lands."

STATUTE INVOLVED

Section 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b, provides in pertinent part:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, * * * as under his rules and regulations are entitled to participate in the use of the range * * * [T]he issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands.

STATEMENT

In order to obtain land for the construction of the Alamo Dam and Reservoir Project in Arizona, the United States brought this condemnation proceeding under the authority of 40 U.S.C. 258a, 33 U.S.C. 701,

and P.L. 534, 78th Congress, to acquire title to 920 of 1,280 acres owned by the landowners.[1] At trial, the landowners contended that since the highest and best use of their land was that of a cattle ranch, the permitted use of the public domain lands should be considered in determining the fair market value of their land. The United States contended that the government should not be required to compensate a landowner for value created by the government by revocable permits to the landowner for grazing on adjacent public lands.

The district court adopted the landowners' theory and instructed the jury in part that "such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land * * *" (App. A, pp. 11–12; 442 F. 2d at 505). The jury returned a verdict of $350,000 for the 920 acres taken (App. A, p. 11; 442 F. 2d at 505).

A divided court of appeals affirmed. The majority noted that in *United States* v. *Rands,* 389 U.S. 121, this Court held that the compensable value of riparian land did not include its special value as a port site on

[1] The landowners' ranch operation consisted of (App. A, 11; 442 F. 2d at 505):

	Acres
Fee land (920 acres taken)	1,280
State leased land	12,027
Taylor Act Grazing Land	31,461
Total	44,768

navigable water since the waters were the property of the nation, but held that *Rands* is distinguishable on the ground that, while the Taylor Grazing Act does not create any interest in the lands as such, "the government's control over Taylor Grazing Act lands is not the same as the absolute control enjoyed under the navigational servitude" (App. A, p. 17, 442 F. 2d at 507). The dissenting judge was of the view that *Rands* controlled this case.

REASONS FOR GRANTING THE WRIT

The effect of the decision below is that the government, which has already subsidized cattle growers through the Taylor Grazing Act, is required, when it exercises its power of eminent domain, to pay again for values, not otherwise inherent in the property, that it has created through its largess. This holding is contrary to established principles of the law of eminent domain and, if allowed to stand, will cause confusion and threaten to introduce anomalies in the administration of federal lands.

1. At present, the Department of the Interior administers 132,669,112 acres of public land within grazing districts under revocable permits.[2] Virtually all grazing districts lie within the Ninth and Tenth Circuits. Most of the government's reclamation projects are located in this same area. Whenever a dam or other project is instituted to reclaim otherwise arid

[2] The Department also administers 26,469,723 acres of grazing lands under firm leases. Public Lands Statistics, 1970, U.S Department of the Interior, Bureau of Land Management page 29.

land or to protect land from destructive flood or erosion damage, significant areas must be acquired. Typically, both privately owned land and public domain lands will be needed in such projects. Much of the private land is held by persons who also have revocable permits for the use of public land. The present case is typical.[3]

2. In requiring the United States to pay landowners an increment reflecting the use of public lands owned by the government, the decision below contravenes the well-established principle of eminent domain law that the government does not pay for value which it has created. *Shoemaker* v. *United States,* 147 U.S. 282, 303–305; *United States* v. *Miller,* 317 U.S. 369, 376–379; *United States* v. *Cors,* 337 U.S. 325, 332–334; *United States* v. *Reynolds,* 397 U.S. 14, 16.

Further, when the United States exercises its power of eminent domain, the Fifth Amendment requires only that it pay for legal rights taken. This Court has consistently recognized that "the existence of value alone does not generate interests protected by the Constitution against diminution by the Government * * *." *Reichelderfer* v. *Quinn,* 287 U.S. 315, 319. The Fifth Amendment requires the United States to pay only for the taking of property rights, "not for opportunities which the owner may lose." *United*

[3] The same questions are presented in *United States* v. *6,404.19 Acres in Phillips County, Mont.* (Lock), D. Mont., Civil No. 2776, decided September 3, 1971, appeal pending. See also the cases discussed *infra.*

States ex rel. T.V.A. v. *Powelson,* 319 U.S. 266, 282. And both the Ninth and Tenth Circuits, in previous cases upholding the revocation of grazing permits without payment of compensation, have recognized that while grazing permits are of value to cattle operators, they do not constitute property rights protected by the Fifth Amendment.[4] *Osborne* v. *United States,* 145 F. 2d 892, 896 (C.A. 9); *United States* v. *Cox,* 190 F. 2d 293, 296 (C.A. 10), certiorari denied, 342 U.S. 867; *Mollohan* v. *Gray,* 413 F. 2d 349, 353 (C.A. 9). Cf. *Acton* v. *United States,* 401 F. 2d 896, 899–900 (C.A. 9), certiorari denied, 393 U.S. 1121, 395 U.S. 945.[5]

Indeed, Section 3 of the Taylor Grazing Act expressly declares that "* * * the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter, shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b. The

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[4] The Act of July 9, 1942, 56 Stat. 654, as amemded, 43 U.S.C. 315q provides for compensation set by the head of the Department utilizing the land when permits are canceled for "war or national defense purposes". The present case does not involve such a purpose; moreover, this provision does not establish any compensable interest or right to compensation except that administratively provided under the Section. See *Osborne* v. *United States, infra.*

[5] Similarly, claimants have been denied compensation for the taking of lands of others in which they have no estate. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 380; *United States* v. *Honolulu Plantation Co.*, 182 F. 2d 172, 175, 177 (C.A. 9), certiorari denied, 340 U.S. 820; *United States* v. *87.30 Acres in State of Washington (Stueckle)*, 430 F. 2d 1130, 1133 (C.A. 9); *United States* v. *677.50 Acres in Marion County, Kan. (Clear Creek)*, 420 F. 2d 1136 (C.A. 10), certiorari denied, 398 U.S. 928.

warding of compensation for enhancement due to possession of revocable permits issued under the Act violates this congressonal directive.

Moreover, as recognized by the dissent below, the rationale of *United States* v. *Rands,* 389 U.S. 121, is fully applicable here. By virtue of the Commerce Clause of the Constitution, Art. I, Sec. 8, the United States is deemed to own a servitude in the flow of navigable streams. Although land bordering on navigable streams enjoys special value in transactions between private individuals (*Boom Co.* v. *Patterson,* 98 U.S. 403; *Ford & Son* v. *Little Falls Co.,* 280 U.S. 69), navigable waters are deemed the "public property of the nation." *Gilman* v. *Philadelphia,* 3 Wall. 713, 725.[6] No expectation of profit from this resource can attach to adjacent private lands which is chargeable in condemnation against the United States; when the United States appropriates the flow of navigable waters, it is "beholden to no one." *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 233. Consequently, special values which inhere in the

[6] See *United States* v. *Willow River Co.,* 324 U.S. 499, 509; *United States v. Chandler-Dunbar Co.,* 229 U.S. 53, 69. The government's interest in a navigable stream amounts, however, to only a quasi-proprietary interest. For instance, the United States does not have fee ownership of the riverbed. *Shively* v. *Bowlby,* 152 U.S. 1, 31. Fee title rests either in the state or in the riparian owner. *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 60. Because the government's proprietary interest in navigable waters is thus limited, the present case presents facts even stronger against compensation than *Rands.*

flow of the stream are allocable to the public; they are not private interests and accordingly are excluded from compensation paid to private landowners. *United States* v. *River Rouge Co.*, 269 U.S. 411. The denial of compensation applies to existing uses, as well as to theoretical or potential uses. See, *e.g.*, *United States* v. *531.13 Acres of Land, Etc.*, (*Duke Power Co.*), 366 F. 2d 915 (C.A. 4), certiorari denied, 385 U.S. 1025. As this Court explained in *Rands*, 389 U.S. at 125, "To require the United States to pay for this * * * value [the value of a right that the government in the exercise of its dominant servitude can grant or withhold as it chooses] would be to create private claims in the public domain." The decision below upholds just such an impermissible claim in the public domain.

3. In *United States* v. *Cox*, 190 F. 2d 293 (C.A. 10), certiorari denied, 342 U.S. 867, the government condemned a ranch comprised of fee land, state leased land and public domain land held under revocable permit, and revoked the permits coincidental with the taking. The court held that the availability and accessibility of public domain lands could not be considered in fixing compensation for the base land in that case. But in *United States* v. *Jaramillo*, 190 F. 2d 300, decided the same day as *Cox*, the Tenth Circuit allowed the jury to consider the value of grazing permits on adjacent public lands when evaluating the fee when, unlike *Cox*, on the date of taking, the permits had not been revoked.

Whether revocation occurred prior to the taking should not be controlling. As the dissent in *Cox* pointed out, the grazing permits even in *Cox* had not been physically revoked on the date of taking. 190 F. 2d at 298. The fact is that there was in that case an irreconcilable conflict between the taking of the cattle rancher's fee base lands and the continuance of permitted grazing upon dependent public domain lands. Exactly the same conflict existed in *Jaramillo*. To make the case turn upon the presence or absence of formal revocation is to exalt form over substance. Cf. *United States* v. *85,237 Acres of Land, etc., in Zapata County, Texas*, 157 F. Supp. 150 (S.D. Tex.), affirmed, 252 F. 2d 116 (C.A. 5).

Cox, Jaramillo, and the instant case taken together make the measure of compensation depend on the choice of the government in cancelling the grazing permits simultaneously with the legal taking of the land or letting the permits remain in effect until the land is physically needed by the government. The attachment of these consequences to the government's choice introduces unfortunate and essentially extraneous considerations into federal land management and tends to undermine the purpose of the Taylor Grazing Act to foster economic use of public lands. Acquiring agencies have found that a substantial time elapses between the filing of a condemnation action and the actual need for the land taken. In order to minimize economic hardship, therefore, these agencies have declined to revoke outstanding permits; and this additional time often enables the government to relocate a rancher's grazing land

and to continue to receive revenues for the use of the land. If this sensible policy is to be discouraged by the burden of greatly increased land acquisition costs, it may have to be modified, to the disadavantage of both cattle raisers and the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

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OCTOBER 1971.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 23,932

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CHESTER FULLER AND MAXINE FULLER (939.62 ACRES OF LAND, MORE OR LESS, IN YUMA AND MOHAVE COUNTIES, STATE OF ARIZONA), DEFENDANT-APPELLEES.

[April 29, 1971]

Appeal from the United States District Court for the District of Arizona

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Before: ELY, WRIGHT and KILKENNY, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal in a condemnation action from udgment entered on a jury verdict fixing $350,000 s just compensation for the taking of two tracts otalling 920 acres. This court has jurisdiction under 8 U.S.C. § 1291.On appeal by the United States, we ffirm.

The land taken was used by the landowners, Mr. nd Mrs. Fuller, as part of a 44,768-acre ranch opera- on composed of:

	Acres
Fee land	1,280
State leased land	12,027
Federal domain leased under the Taylor Grazing Act (43 U.S.C. § 315b)	31,461
Total	44,768

inconsistent with that of *United States v. Rands*, 389 U.S. 121 (1967). *Rands* was a navigational servitude case. There the Court held that the compensable value of private riparian fast lands taken by the government did not include its special value as a port site since the owner had no right of access to the navigable waters which could be legally protected as against the United States.

A careful examination of the rationale of the navigational servitude cases and the federal legislation regarding grazing permits gives rise to a basis for distinguishing the cases relied upon by the government. In *Rands*, it was said:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' *Gilman v. Philadelphia*, 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. . . . Thus, without being constitutionally obligated to pay compensation, the United States may

> change the course of a navigable stream, . . . or otherwise impair or destroy a riparian owner's access to navigable waters, . . . even though the market value of the riparian owner's land is substantially diminished." *Unitd States* v. *Rands,* 389 U.S. at 122–123.

Similarly, in *United States v. Twin City Power Co.,* 350 U.S. 222 (1956), the dominant navigational servitude was held to entitle the government to condemn land without considering its special value as a hydroelectric site.

The government is correct in its assertion that the constitutional provision and subsequent court interpretation authorized Congress to regulate navigable streams to the total exclusion of private rights. *United States* v. *Rands,* 389 U.S. 121, 123. However, when Congress legislates in a manner that recognizes special rights or privileges in navigable waters, then the government is required to compensate for the destruction of such rights, notwithstanding the fact that Congress had the constitutional power to exclude private rights completely. *United States* v. *Twin City Power Co., supra,* at 225.

A study of the Taylor Grazing Act leads to the conclusion that Congress exercised less than its constitutional power over public lands and recognized special rights against third parties and sometimes the government itself. Unlike navigational servitude, there are some private rights and privileges bestowed and protected by the Act which justify the conclusion that the uses to which federal grazing lands are dedicated are unlike the undiminished public uses of navigable streams.

For example, the Act creates section 3 lands and section 15 lands. The later are disconnected, noncontiguous tracts which are not contained in grazing

districts. Section 3 lands, involved here, are located within grazing districts and are administered by the Secretary of the Interior through a system of preferential grazing permits. These run as long as ten years and permit holders have a preferential right to renewal. 43 U.S.C. § 315b.

Though the Act does not create any interest in the lands themselves, it does require that "grazing privileges recognized and acknowledged shall be adequately safeguarded" by the government. 43 U.S.C. § 315b. *See Red Canyon Sheep Co.* v. *Ickes,* 98 F.2d 308, 314 (D.C. Cir. 1938).

While grazing permits are unrevoked, neither the grantor nor third party may interfere with their exercise. In fact, the government has an affirmative obligation to safeguard them adequately. *Oman* v. *United States,* 179 F.2d 738 (10th Cir. 1949).

> "Other courts have held that these permits conferred rights subject to judicial protection. In Arizona the holder of similar grazing permits was said to be entitled to an action of trespass against encroaching ranchers. *Garcia* v. *Sumrall,* 58 Ariz. 526, 121 P. 2d 640. Even the opinion in the *Osborne* case, *supra,* implied that these permits would be 'highly valuable as between private persons'. . . . In the *Red Canyon Sheep Co.* case, 98 F. 2d 308, it was held that, whatever the rights accruing under the permits be denominated, they were entitled to equitable protection." *Oman* at pp. 741–42.

In *McNeil* v. *Seaton,* 281 F. 2d 931 934 (D.C. Cir. 1960), the court held that a new grazing district rule could not be applied to one who had obtained his permit during the first priority period established by the Act. In so holding, the court said that while the permits exist, "they are something of real value . . . which have their source in an enactment of Con-

gress." The court concluded by saying that the permit holders can be protected against wrongful interference by the United States with the statutory rights or privileges represented by the permits.

Thus it can be seen that the government's control over Taylor Grazing Act lands is not the same as the absolute control enjoyed under the navigational servitude.

There is another basis for distinguishing the navigational servitude cases represented by *Rands* and *Twin City*. In those cases the issue was whether the government should pay additional compensation for the theoretical value of potential uses, *i.e.*, port sites and hydroelectric operation. Actual investments had not occurred. There was no congressional policy of use and development of navigable waters as a part of private commercial enterprises.

In situations where the government has requested private investment to help develop and utilize navigable waters, then the government has had to pay the "going concern" value upon condemnation. *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312 (1893). In *Monongahela* the government had to pay both for locks and a dam built at the government's invitation.

The purpose of the Taylor Grazing Act was to develop and stabilize the western cattle business. By providing for regulated use and protection of grazing rights, the government helped to improve the use of the land as did the changes which effected public use of the river in *Monongahela.* The difference between our case and that is one of degree.

It was, therefore, not improper for the trial court to allow the jury to consider the conjunctive use of the fee and permit lands, so long as the jury was

admonished to consider the possibility that the permits might be withdrawn at any time without compensation.

The government's remaining arguments are without merit. Some rely on cases which are distinguishable because the permits were cancelled and the holders of the permits were seeking compensation.[1] Other contentions are answered by *Jaramillo,* with which decision we are in accord.

Affirmed.

KILKENNY, Circuit Judge (dissenting):

I believe that *United States* v. *Rands,* 389 U.S. 121 (1967), controls on the federal lands and that the judgment of the lower court should be reversed.

---

[1] *Osborne* v. *United States*, 145 F.2d 892 (9th Cir. 1944). *Acton* v. *United States*, 401 F.2d 896 (9th Cir. 1968), *cert. den.* 393 U.S. 1121 and 395 U.S. 945. *Mollohan* v. *Gray*, 413 F.2d 349 (9th Cir. 1969).

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 23,932

CHESTER FULLER AND MAXINE FULLER, APPELLANT (939.62 ACRES OF LAND, MORE OR LESS, SITUATED IN YUMA AND MOHAVE COUNTIES, ARIZONA)

v.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 29, 1971.

APPENDIX C

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Wednesday, June 23, 1971

Before: ELY, WRIGHT and KILKENNY, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed June 16, 1971 and within time allowed therefor and valid extension thereof by rule of court, for a rehearing of above cause be, and hereby is denied.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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DEC 18 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, *Petitioner*

vs.

CHESTER FULLER and MAXINE FULLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondents' Brief in Opposition

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	3
Statement	3
Argument	3
Appendix A	

CITATIONS

Cases:	Pages
United States v. Cox, 190 F.2d 293, *cert. denied* 342 U.S. 567	3
United States v. Jaramillo, 190 F.2d 300 (10th Cir. 1951)	2, 3
United States v. Miller, 317 U.S. 369	3
United States v. Rands, 389 U.S. 121	2, 3, 4
United States v. 8968.06 Acres of Land, Etc., Texas, 326 F. Supp. 546 (S.D. Tex. 1971)	4
Constitution and statutes:	
Commerce Clause of the Constitution, Art. I, Sec. 8	3
Rivers and Harbors Act of 1970, Pub. L. 91-611, Title I, § 111 (Dec. 31, 1970), 84 Stat. 1821, 33 U.S.C.A. § 595a	3, 4
Taylor Grazing Act, 48 Stat. 1270, Section 3, as amended 43 U.S.C. 315b	3

In the Supreme Court of the United States

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No. 71-559

UNITED STATES OF AMERICA, *Petitioner*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondents' Brief in Opposition

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Petitioner's Appendix A) is reported at 442 F.2d 94.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether, in determining the compensation due an owner of land taken by the United States, the jury may consider the availability and accessibility of public lands, so long as consideration is also given the possibility that the grazing permits on the public land may be withdrawn.

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix A at pp. 11-13.)

ARGUMENT

Petitioner claims that the rationale of *United States v. Rands*, 389 U.S. 121, is applicable here and that therefore the decision below is in conflict with *Rands*. Respondents submit that the Court of Appeals correctly determined that a careful examination of the rationale of the navigational servitude cases on the one hand and the federal legislation regarding grazing permits on the other, reveals a basis for distinguishing the cases relied upon by the government.

Perhaps more importantly, *Rands* and its predecessors appear to have been legislatively set aside by a statute subsequently enacted by the Ninety-First Congress.

Turning first to the features of this case which render it factually distinguishable from the navigational servitude situations, it becomes at once apparent that the present decision is fully in accord with the only other decision by a Court of Appeals in which the same issue has been squarely presented, *United States v. Jaramillo*, 190 F.2d 300 (10th Cir. 1951). (See Petitioner's Appendix A at 13). In the instant case, the District Court's instruction to the jury was strictly in accord with *Jaramillo*, wherein a

unanimous opinion noted that the forest grazing permits involved therein had not been revoked or withdrawn on the date of the government's taking, whereas in *United States v. Cox*, 190 F.2d 293 (10th Cir. 1951), *cert. denied* 342 U.S. 567, the grazing permits were revoked coincidentally with the taking of the fee. The Court of Appeals in *Jaramillo* no doubt recognized that the land owner was entitled to be placed in as good a position pecuniarily as he would have occupied had his property not been taken, *United States v. Miller*, 317 U.S. 369, and that in so doing the existence of the unrevoked permits was a necessary and proper consideration for the trier of fact.

The opinion below correctly noted that the Taylor Grazing Act, 48 Stat. 1270, Section 3, as amended 43 U.S.C. 315b, created permits conferring upon the holders thereof certain preferential rights and distinguishing features (Petitioner's Appendix A at 16-17) which compel the conclusion that the government's control over Taylor Grazing Act lands is not the same degree of control enjoyed under the navigational servitude conferred upon the government by the Commerce Clause of the Constitution, Art. I, Sec. 8, and that Congress exercised less than its constitutional power over public lands in enacting the Taylor Grazing Act, recognizing special rights against third parties and sometimes the government itself.

Although respondents are confident that the decision of the court below is in no manner in conflict with *Rands*, any bearing *Rands* might have had upon this case by way of analogy has been taken away by subsequent Congressional enactment.

The Ninety-First Congress, in enacting the Rivers and Harbors Act of 1970, Pub. L. 91-611, Title I, § 111 (Dec. 31, 1970), 84 Stat. 1821, 33 U.S.C.A. § 595a, legislatively set

aside *Rands*, and its predecessors. The statute provides in part:

> "In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States *shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. . . .*"
> (Emphasis Supplied, Respondents' Appendix A)

With this enactment, the onerous rule of *Rands* that condemnees are not entitled to compensation based upon value inhering in land due to its contiguity to navigable waters has been overruled by Congress. *United States v. 8968.06 Acres of Land, Etc., Texas,* 326 F. Supp. 546 (S.D. Tex. 1971). In light of this statute it is abundantly evident that the government's reliance upon *Rands* is misplaced.

The Ninety-First Congress by providing in the Rivers and Harbors Act of 1970 that the highest and best use of real property taken by the government may be dependent upon access to or utilization of navigable waters, has clearly declared the government's policy in this area. This enactment provides a persuasive capstone to the already compelling reasons why this Court should end this litigation by denying certiorari.

The Court of Appeals soundly observed:

"The purpose of the Taylor Grazing Act was to develop and stabilize the western cattle business. By providing for regulated use and protection of grazing rights, the government helped to improve the use of the land as did the changes which effected public use of the river in *Monongahela*. The difference between our case and that is one of degree.

It was, therefore, not improper for the trial court to allow the jury to consider the conjunctive use of the fee and permit lands, so long as the jury was admonished to consider the possibility that the permits might be withdrawn at any time without compensation."

(Petitioner's Appendix A at 17-18)

For the foregoing reasons, it is respectfully submitted hat the petition for a writ of certiorari should be denied.

FRANK HAZE BURCH
DANIEL CRACCHIOLO
Attorneys for Respondents

Appendix A

595a. Compensation for taking or condemnation of property for public improvements; fair market value; partial takings; effective date

In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken. The compensation defined herein shall apply to all acquisitions of real property after December 31, 1970, and to the determination of just compensation in any condemnation suit pending on December 31, 1970.

Pub.L. 91-611, Title I, § 111, Dec. 31, 1970, 84 Stat. 1821, 42 U.S.C.A. § 595a

the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

In response to our petition for certiorari, the landowners argue (Br. in Opp. 2) that Congress, by enacting Section 111 of the River and Harbor Act of [illegible], 84 Stat. 1821, 33 U.S.C. 595a, has legislatively "set aside" *United States* v. *Rands*, 389 U.S. 121, and its predecessors. Stated simply, Section 595a provides that where (1) land is taken in its entirety, (2) for public use in connection with the improvement of rivers, harbors, canals, or waterways, (3) the land is to be valued at its best use even if dependent upon access to the navigable waters in question. *Rands*, however, dealt not with what Congress might agree to pay as compensation, but rather with "whether the compensation which the United States is constitu-

453-878—72——1

tionally required to pay when it condemns riparian land includes the land's value as a port site" (389 U.S. at 121). As a statement of the duty of the United States, *absent a statute creating a greater duty, Rands* is still valid law. Moreover, 33 U.S.C. 595a refers only to takings for improvement of navigable rivers and waterways while *Rands*, which relied in part upon *United States* v. *Twin City Power Co.*, 350 U.S. 222, dealt with riparian takings for hydroelectric projects or any other purpose.

In the present case the taking was admittedly not under conditions governed by 33 U.S.C. 595a, nor is there any other statute under which Congress has agreed to pay more than required by the Constitution. In fact, 43 U.S.C. 315q, which provides for compensation set by the head of the Department utilizing the land when grazing permits are canceled for "war or national defense purposes," shows a congressional intent not to allow compensation for such rights where not taken for such purposes, *Osborne* v. *United States*, 145 F. 2d 892, 896 (C.A. 9) (see Pet. p. 6, n. 4), as does the directive of Section 315b that the issuance of a grazing "permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands."

Congress should not by implication be held to have made gifts from the public treasury. And even when Congress has conferred a gratuity, a "further burden * * * should not be added to the gift without the use of the very plainest language." *District of Columbia*

v. *Johnson*, 165 U.S. 330, 339. See, also, *Pine Hill Co.* v. *United States*, 259 U.S. 191, 196.

For the foregoing reasons, and for those set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of Argument	5
Argument:	
I. Revocable permits to use public lands for the grazing of privately owned cattle are not compensable property rights within the meaning of the Fifth Amendment	7
A. The Fifth Amendment requires compensation only for property taken, and not for other value that may be lost	
B. Section 3 of the Taylor Grazing Act expressly provides that the issuance of a grazing permit does not create a property right	
C. The jury in this case was improperly permitted to award compensation for the value of the public domain	
II. The decision below would encourage the government to revoke grazing permits prior to condemnation of the adjoining land, contrary to sound policies of Federal land management	18
Conclusion	21

439-571—72——1

CITATIONS

Cases:

Acton v. *United States*, 401 F. 2d 896, certiorari denied, 393 U.S. 1121, and 395 U.S. 945---
Bell v. *Apache Maid Cattle Co.*, 94 F. 2d 847--
Bothwell v. *United States*, 254 U.S. 231------
Bowman v. *Udall*, 243 F. Supp. 672, affirmed *sub nom.*, *Hinton* v. *Udall*, 364 F. 2d 676, certiorari denied, 385 U.S. 878----------
Brown v. *United States*, 263 U.S. 78---------
Buford v. *Houtz*, 133 U.S. 320----------
Cameron Development Co. v. *United States*, 145 F. 2d 209----------
Chicago, M. St. P. & P.R. Co. v. *Chicago, R. I. & P. R. Co.*, 138 F. 2d 268, certiorari denied, 320 U.S. 804----------
District of Columbia v. *Johnson*, 165 U.S. 330-
Hooten v. *United States*, 405 F. 2d 1167------
J. A. Tobin Construction Co. v. *United States*, 343 F. 2d 422 certiorari denied, 382 U.S. 830----------
John L. Roper Lumber Co. v. *United States*, 150 F. 2d 329----------
Joslin Co. v. *Providence*, 262 U.S. 668-------
Light v. *United States*, 220 U.S. 523---------
McNeil v. *Seaton*, 281 F. 2d 931----------
Mitchell v. *United States*, 267 U.S. 341-------
Mollohan v. *Gray*, 413 F. 2d 349----------
Monongahela Navigation Co. v. *United States*, 148 U.S. 312----------

Cases—Continued

	Page
Mullen Benevolent Corp. v. *United States*, 290 U.S. 89	8
Omaechevarria v. *Idaho*, 246 U.S. 343	9
Oman v. *United States*, 179 F. 2d 738	11
Omnia Co. v. *United States*, 261 U.S. 502	7–8
Osborne v. *United States*, 145 F. 2d 892	11, 12, 17
Pankey Land & Cattle Co. v. *Hardin*, 427 F. 2d 43	20
Pine Hill Co. v. *United States*, 259 U.S. 191	18
Red Canyon Sheep Co. v. *Ickes*, 98 F. 2d 308	11
Reichelderfer v. *Quinn*, 287 U.S. 315	7
R. J. Widen Company v. *United States*, 357 F. 2d 988	8
Scott v. *United States*, 146 F. 2d 131	13
Scully v. *United States*, 409 F. 2d 1061, certiorari denied, 396 U.S. 876	8
Sellas v. *Kirk*, 101 F. Supp. 237, affirmed, 200 F. 2d 217, certiorari denied, 345 U.S. 940	11
Shively v. *Bowlby*, 152 U.S. 1	15
Shoemaker v. *United States*, 147 U.S. 282	12
Stipe v. *United States*, 337 F. 2d 818	8
Tee-Hit-Ton Indians v. *United States*, 348 U.S. 272	8
T.V.A., United States ex rel. v. *Powelson*, 319 U.S. 266	7
United States v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53	15
United States v. *Cors*, 337 U.S. 325	12
United States v. *Cox*, 190 F. 2d 293, certiorari denied 342 U.S. 867	11, 14, 18, 19

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (App. 34–39) is reported at 442 F. 2d 504.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on April 29, 1971. A timely petition for rehearing was denied on June 23, 1971 (Pet. App. C). On September 16, 1971, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including October 21, 1971. The peti-

tion was filed on October 20, 1971, and was granted on January 17, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the owner of land taken by the United States is entitled to have included in the measure of his compensation the value of revocable grazing permits on adjoining federal land issued under an Act of Congress which specifies that such grazing permits create no "right, title, interest, or estate in or to the lands."

STATUTE INVOLVED

Section 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b, provides in pertinent part:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, * * * as under his rules and regulations are entitled to participate in the use of the range * * *. [T]he issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

STATEMENT

In order to obtain land for the construction of the Alamo Dam and Reservoir Project in Arizona, the United States brought this condemnation proceeding under the authority of the Declaration of Taking Act (46 Stat. 1421, 40 U.S.C. 258a), the Flood Control Acts (39 Stat. 950, as amended, 33 U.S.C. 701)

and Pub. L. 534, 78th Congress, to acquire title to 920 of 1,280 acres owned by the respondents. At the time of the taking the respondents grazed their cattle not only on their own lands, but also on 12,027 acres of land leased from the state and 31,461 acres of land belonging to the United States on which they held revocable grazing permits issued under the Taylor Grazing Act (App. 34–35; 442 F. 2d at 505–506). At trial, the respondents contended that since the highest and best use of their land was that of a cattle ranch, the permitted use of the public domain lands and state lands should be considered in determining the fair market value of their land. The United States contended that the government should not be required to compensate a landowner for value created by revocable permits issued by the government to the landowner for grazing on adjacent public lands.

In its pretrial order the district court, adopting the respondents' theory, ruled as follows (App. 13–14):

> If the highest and most profitable use to which the lands might be put is determined to be in connection with a cattle operation, then in that event the use of the lands in connection with adjacent public lands to which the defendant owners have access by way of federal permits or state leases shall be considered, provided consideration is also given to the possibility that the grazing permits or state leases might be withdrawn or canceled at any time without constitutional obligation to pay compensation therefor. *U.S.* v. *Jaramillo,* 190 F. 2d 300 [C.A. 10].

459-571—72——2

At the trial, the respondents' witnesses testified that the land's highest and best use was as a cattle ranch utilizing the abundant, low-priced water on respondents' land for irrigation of that land and allowing the cattle to forage on the adjacent federal and state desert lands when forage was good there (App. 19, 21); that the ranch had a 1,200 cow-unit capacity,[1] based on the combination of privately owned and public domain land (App. 23; Tr. 329, 335–336); and that its capacity would be considerably smaller without forage on the government-owned land (*ibid.*). Mr. Fuller's own analysis supporting the use of his ranch as a "mother cow" operation was based upon the land's fine water, climate, soil and "* * * also * * * the availability of federal land, as well as state land" (App. 25).[2]

While sometimes purporting to value the ranch without regard to the loss of public domain land (*e.g.*, App. 21–22), respondents' witness consistently told the jury (as the court's pretrial ruling permitted) that the ranch including the public land was an enterprise operated as a whole (see App. 23–25).

The district court, adhering to respondents' theory, instructed the jury, over the government's objection,

[1] A "cow unit" is a mother cow and its calf, see App. 16.

[2] Our petition for certiorari presented no question with respect to respondents' use of state lands for grazing, and this Court accordingly need not be concerned with the nature of respondents' rights under state law to the use of those lands or the propriety of the district court's instructions relating thereto. If, however, a new trial is required as a result of this Court's decision, the district court may find it appropriate to revise its instructions concerning the state lands in light of the principles announced by this Court with respect to the federal lands.

that "such permits are mere licenses which may be revoked and are not compensable as such. However, [if you] should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land * * *" (App. 26–27). The jury returned a verdict of $350,000 for the 920 acres taken (App. 29).

The court of appeals affirmed, with one judge dissenting. The majority noted that in *United States* v. *Rands*, 389 U.S. 121, this Court held that the compensable value of riparian land did not include its special value as a port site on navigable water since the waters were the property of the Nation, but held that *Rands* is distinguishable primarily on the ground that, while the Taylor Grazing Act does not create any interest in the lands as such, "the government's control over Taylor Grazing Act lands is not the same as the absolute control enjoyed under the navigational servitude" (442 F.2d 506–508; App. 37–39). The dissenting judge was of the view that *Rands* controlled this case.

SUMMARY OF ARGUMENT

The Fifth Amendment requires compensation only for the taking of property rights, not for other values that may be lost such as business opportunities or the revocable licenses involved here. Congress may provide for compensation beyond that required by the Fifth Amendment but here it has not done so.

Indeed, Section 3 of the Taylor Grazing Act, under which the grazing permits here were issued, expressly provides that the issuance of a grazing permit does

not create a property right. Although such grazing permits undoubtedly are of considerable value, the courts have consistently held that under the Act the government may revoke them without incurring liability. And when Congress has wished cattlemen to receive compensation for the loss of grazing permits, as in the case of land taken for defense purposes, it has specifically so provided. Defense purposes are not involved in the present suit.

A fundamental principle of the federal law of eminent domain is that in arriving at a landowner's constitutionally guaranteed just compensation, the United States is not to be charged with values it has created. The anticipated availability of grazing licenses on public land is a value created by the government; to require the addition of this value to the value of the land expropriated as compensation when the government takes the adjacent land is tantamount to awarding compensation for the value of the public domain in contravention of the rule of *United States* v. *Rands,* 389 U.S. 121. There this Court held that the United States is not required to pay for the value as a port site of riparian land it has taken. The rationale of *Rands,* in which the government had only a dominant servitude, is *a fortiori* applicable where, as here, the government is proprietor and the private license is granted under a statute expressly excluding any private estate in public lands.

The opinion below, if allowed to stand, would penalize the government for postponing cancellation of grazing permits in areas where public projects are

planned from the date when the adjacent land is legally taken until that land is physically needed. As a result, the government would be encouraged to revoke permits before it is otherwise necessary to do so, notwithstanding possible hardships on the permittees and the policy of the Taylor Grazing Act to permit economic use of public lands. The policies of that Act will be better served by giving effect to the Act's declaration that grazing permits conferred under the Act create no property interest, and application of that provision will also prevent unwarranted compounding of the indirect subsidy Congress has provided by permitting grazing on public lands for very low fees.

ARGUMENT

I

REVOCABLE PERMITS TO USE PUBLIC LANDS FOR THE GRAZING OF PRIVATELY OWNED CATTLE ARE NOT COMPENSABLE PROPERTY RIGHTS WITHIN THE MEANING OF THE FIFTH AMENDMENT

A. *The Fifth Amendment requires compensation only for property taken, and not for other value that may be lost.*—It is an established principle of the law of eminent domain that the "existence of value alone does not generate interests protected by the Constitution against diminution by the Government * * *." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319. The government is required to pay only for property taken, "not for opportunities which the owner may lose" (*United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282), such as frustrated business opportunities (*Omnia Co.* v.

United States, 261 U.S. 502) or even the consequential destruction of a business (*Mitchell* v. *United States*, 267 U.S. 341).[4]

Accordingly, the compensation required to be paid is limited to the value of the condemnee's legal rights in the property taken, as this Court held in denying a claim for additional compensation for the lessees' renewal expectancy in a case where the tenants had "occupied their leaseholds by mutual consent for long periods of years * * *." *United States* v. *Petty Motor Co.*, 327 U.S. 372, 380. See also *Scully* v. *United States*, 409 F. 2d 1061 (C.A. 10), certiorari denied, 396 U.S. 876; *United States* v. *22.95 Acres in Whitman County, Washington* (*Almota Farmers Elevator and Warehouse Co.*), 450 F. 2d 125 (C.A. 9), petition for certiorari pending, No. 71-951. And a person using or occupying private property by virtue of a mere license or contracted right, without any legal interest in the land itself, is not entitled to compensation when the property is taken by condemnation. *Chicago, M. St. P. & P.R. Co.* v. *Chicago, R.I. & P. Ry. Co.*, 138 F. 2d 268 (C.A. 8), certiorari denied, 320 U.S. 804. Cf. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279.

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[4] See also *Joslin Co.* v. *Providence*, 262 U.S. 668, 675; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94–95; *Bothwell* v. *United States*, 254 U.S. 231, 233; *United States* v. *677.50 Acres in Marion County, Kan.* (*Clear Creek*), 420 F. 2d 1136 (C.A. 10), certiorari denied, 398 U.S. 928; *Stipe* v. *United States*, 337 F. 2d 818, 821–822 (C.A. 10); *Hooten* v. *United States*, 405 F. 2d 1167 (C.A. 5); *J. A. Tobin Construction Co.* v. *United States*, 343 F. 2d 422 (C.A. 10), certiorari denied, 382 U.S. 830; *R. J. Widen Company* v. *United States*, 357 F. 2d 988 (C. Cls.).

While, in any of these situations, Congress may, of course, provide for payment in excess of the just compensation that is constitutionally required (*Brown* v. *United States*, 263 U.S. 78; *United States* v. *Realty Co.*, 163 U.S. 427), it has not done so here.

B. *Section 3 of the Taylor Grazing Act expressly provides that the issuance of a grazing permit does not create a property right.* Prior to the creation of the National Forests in 1891,[5] ranchers in the West considered the use of public domain lands theirs for the taking.[6] The government did not object and the unregulated use of this public land for private profit became entrenched and led to range wars and destruction of large parts of the range through overgrazing. Cattlemen saw free use of the range as their inalienable right, but in *Buford* v. *Houtz*, 133 U.S. 320, 326, this Court ruled that such permissive occupancy conferred only an "implied license" to use the land so long as "no act of the government forbids its use." See also *Omaechevarria* v. *Idaho*, 246 U.S. 343, 352.

The Forest Service Organic Act[7] empowered the Secretary of Agriculture to regulate the "use and occupancy" of the national forests (which included considerable range land). When the Secretary

[5] 26 Stat. 1103, as amended, 16 U.S.C. 471.

[6] For a discussion of the history and economics of grazing rights on public lands see Kingery, *The Public Grazing Lands*, 43 Denv. Law. J. 329; Nielsen and Wennergren, *Public Policy and Grazing Fees on Federal Lands: Some Unresolved Issues*, 5 Land & Water Law Rev. 293.

[7] Act of June 4, 1897, 30 Stat. 11, 35, as amended, Act of Feb. 1, 1905, 33 Stat. 628, as amended, 16 U.S.C. 551.

began to require permits to graze livestock in the national forests cattlemen objected, but this Court upheld the right of the government to grant or deny access to its public domain lands on such terms as it saw fit, and rejected claims by grazers to a vested right in the use of those lands. *Light* v. *United States*, 220 U.S. 523; *United States* v. *Grimaud*, 220 U.S. 506; see also *Bell* v. *Apache Maid Cattle Co.*, 94 F. 2d 847 (C.A. 9).

Against this background, Congress, in enacting the Taylor Grazing Act of 1934 (48 Stat. 1269, as amended, 43 U.S.C. 315), carefully distinguished between a license to use the public land, and a leasehold interest in it. Section 15 of the Act, 43 U.S.C. 315m, authorizes leases of public lands for grazing purposes, but only if the land is not suitable for inclusion in a grazing district to be established under other provisions of the Act. Section 3 of the Act, 43 U.S.C. 315b, the Section applicable here, clearly provides only for revocable grazing permits. The Section shows no intent to authorize or confer any property interest in the federal lands, such as those involved here,[8] which have been established as grazing districts under the Act. And any possible doubt is dispelled by the Act's provision that "* * * the cre-

[8] See 442 F. 2d at 505; App. 34–35. The grazing permits were on land within Arizona Grazing District No. 2, established by Secretarial order 114230, dated March 6, 1936, 43 C.F.R. 502.1 (1940 ed.), and Arizona Grazing District No. 3, established by Secretarial order dated July 14, 1938, 3 Fed. Reg. 1795. See also Public Land Order 492, dated July 13, 1948, 13 Fed. Reg. 3938, which without withdrawing the lands from the grazing districts subordinates them to the Alamo project. Grazing has been permitted to continue until the lands are physically needed for the project.

ation of a grazing district or the issuance of a permit pursuant to the provisions of the subchapter, shall not create any right, title, interest or estate in or to the lands." 48 Stat. 1270, 43 U.S.C. 315b.

Accordingly, even though revocable grazing permits issued under the Act undoubtedly are of value to the permittees,[9] the courts have consistently held that the United States may revoke them without incurring liability, since the permits confer no compensable property interest in the public lands. *Osborne* v. *United States,* 145 F. 2d 892, 896 (C.A. 9); *Mollohan* v. *Gray,* 413 F. 2d 349, 353 (C.A. 9); *Sellas* v. *Kirk,* 101 F. Supp. 237, 239 (D. Nev.), affirmed, 200 F. 2d 217 (C.A. 9), certiorari denied, 345 U.S. 940; *United States* v. *Cox,* 190 F. 2d 293, 296 (C.A. 10), certiorari denied, 342 U.S. 867; *Oman* v. *United States,* 179 F. 2d 738, 741–742 (C.A. 10); *McNeil* v. *Seaton,* 281 F. 2d 931, 934 (C.A. D.C.); *Bowman* v. *Udall,* 243 F. Supp. 672, 678 (D. D.C.), affirmed *sub nom. Hinton* v. *Udall,* 364 F. 2d 676 (C.A.D.C.), certiorari denied, 385 U.S. 878; cf. *United States* v. *87.30 Acres of Land, Etc., State of Wash. (Stueckle),* 430 F. 2d 1130, 1133 (C.A. 9); *Acton* v. *United States,* 401 F. 2d 896, 899–900 (C.A. 9), certiorari denied, 393 U.S. 1121, and 395 U.S. 945.[10]

[9] The fees charged are usually well below the value of the forage. See *Public Policy and Grazing Fees on Federal Lands,* 5 Land & Water L. Rev. 303–305. See also note 14 *infra.*

[10] Even *Red Canyon Sheep Co.* v. *Ickes,* 98 F. 2d 308 (C.A. D.C.), relied upon by the majority below (App. 38), states: "We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property." *Id.* at 315. The court there held only that grazing privileges were "a proper subject of equitable protection against an illegal act." *Id.* at 315–316.

Indeed, when Congress has wished cattlemen to receive compensation for the loss of grazing permits it has expressly so provided, but even then without raising the permits to the status of property rights that are compensable under the Fifth Amendment. In 1942, Congress amended the Taylor Grazing Act and the Forest Service Act to provide for administrative compensation, set by the head of the department utilizing the land, when permits are cancelled for "war" purposes (later amended to read "defense" purposes).[11] But in providing this additional relief Congress specifically recognized that the holders of such permits were not otherwise entitled to compensation. See 88 Cong. Rec. 5594; 88 Cong. Rec. 5652; H. Rep. No. 2290, 77th Cong., 2d Sess.; *Osborne* v. *United States,* 145 F. 2d 892 (C.A. 9). The present case does not involve defense purposes.

C. *The jury in this case was improperly permitted to award compensation for the value of the public domain.* It is a general principle of the federal law of eminent domain that in determining a landowner's constitutionally guaranteed just compensation, the United States is not to be charged for values which it has created. *United States* v. *Cors,* 337 U.S. 325, 332–334; see *Shoemaker* v. *United States,* 147 U.S. 282, 303–305; *United States* v. *Miller,* 317 U.S. 369, 376–379;

[11] Act of July 9, 1942, 56 Stat. 654, as amended, 43 U.S.C. 315q.

United States v. *Reynolds,* 397 U.S. 14, 16.[12] If value was added to the respondents' land by the availability of permits to use adjacent public lands, this is a value which the government created by allowing its lands to be used without requiring payment for their full value. Thus, by expressly directing the jury to consider the availability and accessibility of 31,461 acres of the adjacent public domain land, the court invited the jury to require the government to pay for value it created. And, since that value here was entirely in the use of public lands, this was tantamount to permitting the jury to award compensation for the value of the public domain—contrary, we submit, to the doctrine of *United States* v. *Rands,* 389 U.S. 121.

In *Rands,* the question before this Court was: "Whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site." The Court held it does not. 389 U.S. at 127. The Court did not deny that access to navigable waters may enhance the market value of riparian land. *Id.* at 126. But navigable waters are the public property of the

[12] See also *United States* v. *901.89 Acres in Davidson and Rutherford Counties, Tenn.* (*Davenport*), 436 F.2d 395, 396–397 (C.A. 6), certiorari denied, 402 U.S. 973; *Cameron Development Co.* v. *United States,* 145 F.2d 209, 210 (C.A. 5); *United States* v. *Rayno,* 136 F.2d 376, 378–379 (C.A. 1), certiorari denied, 320 U.S. 776; *United States* v. *2,477.79 Acres in Bell County,* 259 F.2d 23, 27 (C.A. 5); *John L. Roper Lumber Co.* v. *United States,* 150 F.2d 329, 330–331 (C.A. 4); *Scott* v. *United States,* 146 F.2d 131, 132 (C.A. 5).

Nation, *id.* at 123, and special values which inhere in the flow of a navigable stream are thus allocable solely to the public. Accordingly, where the government itself takes riparian land (*id.* at 123–124):

> "just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, * * * it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." * * *

"To require the United States to pay for this * * * value would be to create private claims in the public domain." *Id.* at 125.

The rationale of *Rands* is fully applicable to the situation here, as the dissenting judge below recognized.[13] In both *Rands* and the present case, the likely availability of the use of the adjacent public land (or water) would undoubtedly have increased the value of the privately owned land in dealings between private individuals. The question in both cases was whether the government, in taking that private land, must pay not only the value of the land itself but also the special value added by the use of adjacent public land or water.

The court below held (442 F. 2d at 506–507; App. 36–37) that *Rands* is distinguishable because the government's navigational servitude is absolute while private rights bestowed under the Taylor Act make

[13] See also *United States* v. *Cox*, 190 F. 2d 293, 297 (C.A 10), certiorari denied, 342 U.S. 867.

the government's rights in grazing lands less absolute. But the reverse is at least equally true. The government owns its range lands as proprietor (*United States* v. *Grimaud,* 220 U.S. 506); its interest in a navigable stream is, by contrast, only quasi-proprietary. The United States does not have fee ownership of the riverbed. *Shively* v. *Bowlby,* 152 U.S. 1, 31. Fee title rests either in the state or in the riparian owner. *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 60. And riparian owners have a vested right of access to and use of navigable waters—rights which are servient only to the government's navigation servitude. *United States* v. *River Rouge Co.,* 269 U.S. 411, 417–418.

Thus, here, as in *Rands,* the question is not whether private use of public land or water is forbidden or subject to administrative and judicial protection, but, rather, whether anticipated continuance of the use of this public property is sufficiently vested to be private property for which the government is constitutionally required to pay compensation when the adjacent land is taken. In the absence of such a property right, the government should not be required to reimburse a private citizen for his loss of the use of public property, whether wet or dry. And, as previously noted (*supra,* pp. 10–11), in the Taylor Grazing Act Congress has specified that the issuance of grazing permits under that Act creates no such property right.

The court below, however, also expressed the view that compensation is owed here for the value of public

lands because there was a present use of the public asset rather than a contemplated use as in *Rands* (442 F. 2d at 507, App. 39), citing *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312. In *Monongahela* the government expropriated a lock and dam operated by a private company under Charter from the State of Pennsylvania. The Court held that the value of anticipated revenues from lawfully charged tolls as well as the value of the physical structure must be included in providing the just compensation required by the Fifth Amendment (*id.* at 341–345). The Court's decision was, however, specifically based on a finding that the company's right to collect the tolls was *not* "a mere revocable license." *Id.* at 344. Here we are concerned with mere revocable licenses. There is thus no inconsistency between *Monongahela and Rands*, or between *Monongahela* and the government's position here.

In response to our petition for certiorari, the landowners argued (Br. in Opp. 2–3) that Congress, by enacting Section 111 of the River and Harbor Act of 1970, 84 Stat. 1821, 33 U.S.C. 595a, legislatively "set aside" *United States* v. *Rands*, 389 U.S. 121, and its predecessors—and that the rationale of *Rands* should for that reason not be applied here. Stated simply, Section 595a provides that where (1) land is taken in its entirety, (2) for public use in connection with the improvement of rivers, harbors, canals, or waterways, then (3) the land is to be valued at its best use even if dependent upon access to the navigable waters in question. *Rands*, however, dealt not with what Con-

gress might agree to give as compensation, but rather with "whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site" (389 U.S. at 121). As a statement of the duty of the United States, *in the absence of a statute creating a greater duty, Rands* is still valid law. Moreover, 33 U.S.C. 595a refers only to takings for improvement of navigable rivers and waterways while *Rands,* which relied in part upon *United States* v. *Twin City Power Co.,* 350 U.S. 222, dealt with riparian takings for hydroelectric projects or any other purpose.

In the present case the taking was admittedly not under conditions governed by 33 U.S.C. 595a, nor is there any other statute under which Congress has agreed to pay more than required by the Constitution. In fact, 43 U.S.C. 315q, which provides for compensation set by the head of the Department utilizing the land when grazing permits are canceled for "national defense purposes," shows a congressional intent not to confer compensation for such rights where not taken for such purposes, *Osborne* v. *United States,* 145 F. 2d 892, 896 (C.A. 9), as does the directive of Section 315b that the issuance of a grazing "permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands."

We, of course, do not contend that Congress could not here provide for compensation beyond that required as just compensation under the Fifth

Amendment. But Congress should not by implication be held to have made gifts from the public treasury. And even where Congress has conferred a gratuity, a "further burden * * * should not be added to the gift without the use of the very plainest language." *District of Columbia* v. *Johnson*, 165 U.S. 330, 339. See, also, *Pine Hill Co.* v. *United States*, 259 U.S. 191, 196.

II

THE DECISION BELOW WOULD ENCOURAGE THE GOVERNMENT TO REVOKE GRAZING PERMITS PRIOR TO CONDEMNATION OF THE ADJOINING LAND, CONTRARY TO SOUND POLICIES OF FEDERAL LAND MANAGEMENT

The opinion below, relying on *United States* v. *Jaramillo*, 190 F.2d 300 (C.A. 10), would make the government's duty to pay a landowner for the value of access to grazing lands depend upon whether any existing permit has been revoked prior to the date of taking of his land. 442 F.2d 505–506; App. 36–37. It is apparently admitted that had the government revoked respondents' grazing permit before taking their land, it would not have been proper for the jury to consider the value of grazing rights. This would follow from *United States* v. *Cox*, 190 F. 2d 293 (C.A. 10), certiorari denied, 342 U.S. 867, and *Jaramillo* read together.

In *Cox*, decided the same day as *Jaramillo*, the government condemned a ranch comprised of fee land, state leased land and public domain land held under revocable permits, and revoked the permits coincidentally with the taking. The court held that the availabil-

ity and accessibility of public domain lands could not be considered in fixing compensation for the base land in that case. But in *Jaramillo,* the Tenth Circuit allowed the jury to consider the value of grazing permits on adjacent public lands when evaluating the fee when, unlike *Cox,* the permits had not been revoked on the date of taking.

Whether revocation occurred prior to the taking should not be controlling. The government can of course revoke grazing permits prior to or as part of a taking. Acquiring agencies, however, have found that a substantial time elapses between condemnation of land for the project and the actual need to utilize adjacent Taylor Grazing Act lands. In order to minimize economic hardship, therefore, the government generally does not revoke outstanding permits until there is an actual need to do so; this additional time may enable the government to find new grazing land for a rancher and at least allows him to continue to use his existing permit as long as possible while he makes necessary adjustments. If the government's practice in this respect is to be penalized by a substantial addition to the cost of acquiring land for public projects, the choice given to the United States would be either to disrupt the condemnee's business operations by unduly cancelling grazing permits simultaneously with the legal taking of the adjoining land, or to suffer inflated costs of acquisition by letting the permits remain in effect until the land is physically needed by the government. The attachment of these consequences to the government's choice would introduce unfortunate and essentially

extraneous considerations into federal land management and would tend to undermine the purpose of the Taylor Grazing Act to foster economic use of public lands. And, as we argue in point I, *supra,* the very existence of this choice refutes respondents' contention that anticipated use of the federal grazing lands is a compensable property right for purposes of the Fifth Amendment.

It is not without significance that the use of public lands for grazing at bargain rates represents in effect a subsidy which the cattle industry has endeavored to maintain.[14] The decision below would, in the absence of early revocation of grazing permits, in effect require a second subsidy to the cattleman at the time his land is condemned. Moreover, where less than all of the cattleman's adjoining fee land is taken, the chain of subsidy would lengthen, for the cattleman could continue to use the very range land for whose loss he has been compensated—and presumably he would again receive additional payment for the same grazing lands if part or all of his remaining base land were subsequently taken. This concatenation, we submit, confirms Congress' wisdom in declaring in the Act that a grazing permit "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b.

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[14] See *Pankey Land & Cattle Co.* v. *Hardin*, 427 F.2d 43 (C.A. 10); *One Third of the Nation's Land* (Public Land Law Review Commission, GPO, 1970), pp. 105–106, 117–118; Hearings on Grazing Fees on Public Lands before the Subcommittee on Public Lands, Committee on Interior and Insular Affairs, 91st Cong., 1st Sess., pp. 6, 115, 116–123, 139; Gates, Paul W., *History of Public Land Law Development* (1968), pp. 627, 632. See also note 9 *supra.*

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, *Petitioner*

vs.

CHESTER FULLER and MAXINE FULLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief for the Respondents

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193

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statement	2
Summary of Argument	5
Argument	7
The Availability and Accessibility of Public Lands May Be Considered in the Evaluation of Condemned Lands So Long as Consideration Is Also Given the Possibility That the Grazing Permits on the Public Land May Be Withdrawn Without Compensation	7
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases	Pages
Chournous v. United States 193 F.2d 321 (10th Cir. 1952)	8
Ciriarte v. United States, 157 F.2d 105, (1st Cir. 1946)	11
Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239 (1934)	15
Hatahley v. United States, 351 U.S. 173 (1956)	8
McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960)	8
Mitchell v. United States 267 U.S. 341	8
Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)	16, 17
Olson v. United States, 292 U.S. 246 (1934)	5
Omaechevarria v. Idaho 246 U.S. 343 (1918)	8
Omnia Commercial Co. v. United States, 261 U.S. 502 (1923)	8, 16, 17
Red Canyon Sheep Co. v. Ickes 98 F.2d 308 (D.C. Cir. 1938)	8
Sproul v. Gilbert, 225 Ore. 442, 359 P.2d 543 (1961)	8
United States ex rel T.V.A. v. Powelson 319 U.S. 266 (1943)	6, 8
United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913)	6, 13, 14, 15, 16, 17
United States v. Citrus Valley Farms, Inc., 350 F.2d 683 (9th Cir. 1965)	11
United States v. Cox 190 F.2d 293 (10th Cir. 1951), cert. denied, 342 U.S. 567	9, 10

Pages

United States v. Jaramillo 190 F.2d 300, 302 (10th Cir. 1951) 9, 10, 13, 19
United States v. Miller, 317 U.S. 369 (1943) 5, 7, 19
United States v. Rands, 389 U.S. 121 (1967) 4, 5, 6, 13, 16, 17, 18
United States v. Twin City Power Co., 350 U.S. 222 (1956) 6, 14, 15, 16, 17

STATUTES

Taylor Grazing Act:
48 Stat. 1269 (1934) 43 U.S.C. § 315 (1958) 7, 8
48 Stat. 1270, Section 3, as amended 43 U.S.C. 315b 2, 11, 12
43 U.S.C. 315o-1(b) 12
43 C.F.R.:
§ 3150-1(b) 12
§ 4110 (1968) 12
§ 4115.2-2 (1968) 12
Rivers and Harbors Act of 1970, 84 Stat. 1821, 33 U.S.C. § 595a 17, 18

TEXTS

Calef and Wesley Private Grazing and Public Lands (1960) 8
2 Lewis, Eminent Domain, § 721 (3rd Ed.) 9
4 Nichols, Eminent Domain p. 59 (Rev. 3rd ed. 1963) 10
Ragsdale, § 3 Rights Under the Taylor Grazing Act, 4 Land and Water L. Rev. 399 (1969) 12

In the Supreme Court of the United States

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No. 71-559

UNITED STATES OF AMERICA, *Petitioner*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief for the Respondents

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. 34-39) is reported at 442 F.2d 504.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioner.

QUESTION PRESENTED

Whether, in determining the compensation due an owner of land taken by the United States, the jury may consider the availability and accessibility of public lands, so long

as consideration is also given the possibility that the grazing permits on the public land may be withdrawn.

STATEMENT

The Statement in the Brief for the Petitioner is essentially correct. On September 29, 1967, respondents owned in fee 1,280 acres composed of three separate parcels of land near the confluence of the Big Sandy and Bill Williams rivers in western Arizona. These three parcels of land constituted an integral part of a larger cattle ranch operated by respondents and consisting of the basic fee land, land leased from the State of Arizona, and federal land used by respondents under exclusive revocable grazing permits.[1]

On the date stated the United States instituted a proceeding in eminent domain to acquire title to two parcels of respondents' land consisting of a total of 920 acres. At no time prior to or during the pendency of the condemnation action were respondents' grazing permits on the public lands revoked nor were such lands included in the condemnation action.

In the District Court the testimony more than amply demonstrated that respondents were engaging in a large scale cattle operation known as a year-round "cow-calf" ranch. (App. 20) Due to the presence of an abundance of low cost water on the fee lands taken, these areas were cleared, cultivated and irrigated. Year-round grazing could thus be provided for respondents' cattle. When favorable climatic conditions existed the public lands could be used for grazing and the irrigated lands could be harvested for ensilage. Such rotating usage with a dependable water source on the fee lands created a stable operation which

1. Respondents have grazing permits upon the federal land pursuant to the provisions of § 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. Sec. 315b.

allowed the operation of this "cow-calf" ranch as opposed to a "steer" operation (App. 19-20). Testimony showed that in a "cow-calf" operation a breeding herd is maintained to produce a yearly crop of calves and replacement heifers (App. 19). It was shown that such an operation is possible only if a constant source of food is available. This operation is, in the long run, the more profitable and dependable of the two operations (App. 20). In a "steer" operation the rancher purchases steers every year, fattens them on the available feed and then sells them as soon as the desert feed source diminishes (App. 20).

Prior to the trial in the District Court, respondents insisted that the conjunctive use of respondents' fee land with the federal permit and state leased land was evidence which should properly be before the jury and furthermore, that the jury should be allowed to consider the accessibility and availability of the public land upon which appellees held grazing permits *so long as consideration was given to the possibility of the withdrawal of the permits at any time without compensation.* Over objection of the United States this principle was accepted by the District Court and testimony and evidence of the availability and accessibility of permit lands was introduced. At the close of the trial the court, over the objection of the United States, gave the following instruction:

> "During the course of this trial, reference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or can-

celed at any time without a constitutional obligation to pay the compensation therefor.

"Evidence has been introduced of defendants' use of their deeded land which is being taken, in conjunction with surrounding land owned by the United States, for which defendants have grazing permits, and land belonging to the State of Arizona, which defendants leased. In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or the State of Arizona. However, in determining the value of the fee land and in awarding compensation to the owners, you should consider the availability and accessibility of the permit and leased land and its use in conjunction with the fee land taken and give to the fee land such value as, in your judgment, according to the evidence, should be given on account of such availability and accessibility of the permit and leased land, if any. You should also consider the possibility that the permits on the United States land could be withdrawn at any time without constitutional obligation to pay compensation therefor and determine the effect you feel such possibility, according to the evidence, would have upon the value of the fee land." (App. 26-27).

The jury returned a verdict of $350,000 for the 920 acres taken (App. 29). In affirming, the Court of Appeals noted that the case of the *United States v. Rands*, 389 U.S. 121, does not control in this instance because, in enacting the Taylor Grazing Act, Congress:

". . . exercised less than its constitutional power over public lands and recognized special rights against third parties and sometimes the government itself. Unlike navigational servitude, [Rands] there are some private rights and privileges bestowed and protected by the Act which justify the conclusion that the uses to

which federal grazing lands are dedicated are unlike the undiminished public uses of navigable streams." 442 F.2d at 506.

SUMMARY OF ARGUMENT

Consideration of the availability and accessibility of lands for which grazing permits have been issued under the Taylor Grazing Act in determining the value of fee land taken in condemnation is consistent with established precedent. The facts and principles which govern the riparian rights situation as depicted in the *United States v. Rands*, 389 U.S. 121 (1967), are sufficiently distinguishable so as to have no application in situations involving the conjunctive use of fee and Taylor Grazing Act permit lands.

While a fundamental principle of the federal law of eminent domain holds that in arriving at a landowner's constitutionally guaranteed just compensation, the government is not to be charged with value it has created, a perhaps even more fundamental principle of the federal law of eminent domain is that just compensation includes all elements of value, including the fact that the most profitable use of a parcel can be made only in combination with others lands. *Olson v. United States*, 292 U.S. 246 (1934). Unless consideration is given to the existence of adjacent federal permit lands in the condemnation of the fee land and unless these permit lands are considered as appurtenant elements which give added value to the basic fee land, then condemnees are denied the "full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369 (1943).

A determination of the fair market value of a given piece of property requires that consideration be given to all the uses and purposes to which the property is reasonably adaptable and capable of being used. If the highest and

best use of property is in conjunction with contiguous property not owned in fee by the condemnee, this use may nevertheless be shown if it has a definite effect upon the fee land and enhances the market value of that property. *United States ex rel T.V.A. v. Powelson,* 319 U.S. 266 (1943).

The fact that a license, permit or privilege is revocable at the will of the sovereign without liability to pay therefor does not mean that such conditional or qualified rights cannot constitute appurtenant elements of value with regard to the land actually taken, at least so long as such licenses, permits or privileges remain outstanding. It cannot seriously be doubted that respondents' possession of the grazing permits would have been taken into account in negotiations between respondents and a hypothetical willing buyer. Thus, the permit land can be considered as enhancing the market value of the fee land taken.

The government's reliance upon *United States v. Rands,* 389 U.S. 121, is misplaced. The result in *Rands* was bottomed upon the "unique powers over navigable waters which the Constitution bestows upon the federal government." In *Rands* this Court followed two earlier navigational servitude cases, *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913) and *United States v. Twin City Power Co.,* 350 U.S. 222 (1956). *Twin City* and *Chandler-Dunbar,* supra, clearly point out that where Congress has chosen to legislate in such manner as to recognize certain rights or privileges in navigable streams, the government is required to compensate for the destruction of such rights notwithstanding the fact that Congress had the Constitutional power to regulate navigable streams to the total exclusion of private rights. There are two critical distinctions between the instant case and riparian fast land cases. An analysis of the Taylor Grazing Act (1) leads to the conclusion that Congress exercised less than its Constitutional power over public lands and (2) recognized certain

rights as against third parties and the government itself at least enough so as to justify the rule that permittees' fee land cannot be taken without reference to the value added thereto by the grazing rights.

To reverse the decision and opinion of the Ninth Circuit Court of Appeals in the instant case would be to thwart the overriding public policy which demands that the owner of land taken by condemnation should be made whole. Condemnees should receive in compensation the fair and perfect equivalent of what they had. Those in a position of respondents herein are entitled to be placed in as good a position as they would have occupied had their property not been taken. They are entitled to "market value fairly determined". *United States v. Miller,* 317 U.S. 798 (1943). A landowner whose property is taken in condemnation proceedings is entitled to market value thereof which denotes what it fairly may be believed that a purchaser in fair market conditions would have given. *United States v. Miller,* supra. The government would have this court disregard the reactions of a willing seller and a willing buyer. Its position would require an appraisal based on factors that are not a true reflection of the market and would result in compensation substantially less than that which this court has, by long held precedent, required.

ARGUMENT

The Availability and Accessibility of Public Lands May Be Considered in the Evaluation of Condemned Lands So Long as Consideration Is Also Given the Possibility That the Grazing Permits on the Public Land May Be Withdrawn Without Compensation.

The Taylor Grazing Act, 48 Stat. 1269 (1934) 43 U.S.C. 315 (1958) was passed by Congress in 1934 and was the culmination of a fifteen year political battle over closer federal management of public lands. After generations of

free and unlimited use, range lands had been greatly harmed by range wars and continuing range deterioration.[2] Congress' avowed purpose in passing the Taylor Grazing Act was to benefit and stabilize the livestock industry, to protect grazing rights and privileges and to provide "the most beneficial use of the public range". *Hatahley v. United States,* 351 U.S. 173 (1956); *Chournos v. United States* 193 F.2d 321 (10th Cir. 1952); *Red Canyon Sheep Co. v. Ickes* 98 F.2d 308 (D.C. Cir. 1938). Grazing on public lands had existed traditionally at the sufferance of the Federal government. *Omaechevarria v. Idaho* 246 U.S. 343 (1918). The Taylor Grazing Act replaced that "right by sufferance" with a "right by permission". The courts recognize that both the right to graze and the right to a grazing permit are valuable rights. *McNeil v. Seaton,* 281 F.2d 931 at 934 (D.C. Cir. 1960). While federal courts define the grazing permit as a preference and a privilege, *McNeil,* supra, other courts have considered different ramifications. In *Sproul v. Gilbert,* 225 Ore. 442, 359 P.2d 543 (1961), the rights under the Taylor Grazing Act were held sufficiently possessory to be taxable within the meaning of a statute imposing a tax on property of the United States held under lease.

Yet here, the government, in support of its position, likens respondents' Taylor Grazing Act permits to "business opportunities" (Brief of Pet. 7). Respondents fail to perceive the similarity between the cases which have held that where the government condemns property it shall not have to pay for opportunities which the owner may lose, (*United States ex rel T.V.A. v. Powelson* 319 U.S. 266 1943) frustrated business opportunities, (*Omnia Commercial Co. v. United States,* 261 U.S. 502 1923) or consequential destruction of a business (*Mitchell v. United States* 267

2. Calef and Wesley *Private Grazing and Public Lands* (1960).

U.S. 341) and the facts which give rise to the instant case. It is not the frustration of a business opportunity which results from the condemnation or respondents' land but is instead the taking of an already existing use of the permit lands in conjunction with those held in fee, the kind of large scale cattle operation made uniquely possible by the existence of the permit lands. Thus the condemnation does not affect some potential benefits but instead a use of land under an existing permit. It is widely conceded that a landowner may have taken into consideration in the evaluation of his property for condemnation purposes the proximity of schools, roads, markets, water and other environmental appurtenant elements of value. 2 Lewis, *Eminent Domain,* § 721 (3rd Ed.); *United States v. Jaramillo* 190 F.2d 300, 302 (10th Cir. 1951).

The dissent in *United States v. Cox* 190 F.2d 293 (10th Cir. 1951), *cert. denied,* 342 U.S. 567, very ably pointed out the fallacy in attempting to distinguish the aforementioned appurtenant elements of value from the existence of grazing permits. The following illustration and analogy was used:

> Let us assume that an individual owns a block of land in a city on which he has constructed his home; that it is situated on a two lane parkway street with the parkway beautifully landscaped; that adjacent to the home there is located a public park and a public school which enhance the value of his block of land; that the municipality owning the public park, street and the public school decides to demolish the school and to utilize the school grounds, the street and the public park for the construction of a stadium and for parking space and roadways leading thereto and that it sought to condemn the presently owned block of land to be included in the project. Obviously any enhancement of value that would result from the construction of the project could not be considered at arriving at

> the value of the individual's privately owned block of land. Likewise it seems to me that the municipality could not urge that in determining the market value of the privately-owned land at the time of the taking, consideration could not be given to the enhancement of value resulting from the public park, parkway street and public school, because it was contemplated that in the future the park, the parkway street and school building would cease to exist and would no longer be available. I emphasize that the question is not consequential damages resulting from the taking away of the park, parkway street and the school for other public purposes, but the value of the privately-owned land taken in its environment at the time of the taking. 190 F.2d 293, 299 (10th Cir. 1951) *cert. denied* 342 U.S. 567.

The fact that respondents had the exclusive right to use the public lands upon which they held federal grazing permits does not distinguish the public lands in the case at bar from the environmental factors considered in *United States v. Cox,* 190 F.2d 293 (10th Cir. 1951) and *United States v. Jaramillo,* 190 F.2d 300 (10th Cir. 1951). In fact, according to the general federal rule defining market value, it is proper to take into consideration the availability and accessibility of permit land as an appurtenant element of value for ranching purposes, provided that consideration is given to the possibility that the permits could be withdrawn or canceled by the government at any time. *United States v. Jaramillo,* supra. The general rule is further set forth at 4 Nichols, *Eminent Domain* p. 59 (Rev. 3rd ed. 1963):

> Whatever in its location, surroundings, and appurtenances contributes to the availability of land for valuable uses is proper evidence for consideration in estimating the salable character of land and in ascertaining its market value. Generally speaking, the true rule seems to be to permit proof of all the varied element

> of value; that is, all the facts which the owner would properly would naturally press upon the attention of a buyer with whom he is negotiating a sale and all the facts which would naturally influence a person of ordinary prudence desiring to purchase.

There is no doubt that respondents' possession of the grazing permits would be taken into account in negotiations between them and a hypothetical willing buyer. This being so, then the government permit can be considered as enhancing the market value of the property in a condemnation proceeding. *Ciriarte v. United States,* 157 F.2d 105, 111 (1st Cir. 1946). Cf., *United States v. Citrus Valley Farms, Inc.,* 350 F.2d 683 (9th Cir. 1965). While § 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended 43 U.S.C. 315b, provides that the issuance of a permit pursuant to the provisions of that subchapter shall not create any right, title, interest or estate in or to the land, such statutory provision does not and cannot foreclose the fact that the existence of unrevoked grazing permits is an element of value which should be taken into account in determining the fair market value of the base lands owned in fee. It is quite clear that Congress, in specifically providing that such grazing permits shall not create any right, title, interest or estate in or to the lands, intended that it make quite clear the governmental policy that the issuance of a permit would vest no interest in the permittee which interest the permittee could then claim *in fee.* Clearly, however, Congress did not intend by this section that the existence of the permit was to be of no value to the holder thereof.

One of the primary indications that what the permittee receives is in fact a right, is the provision in the Act for transference of the right, either as an appurtenance to the base property or to entirely new base property. The Range

Code (43 C.F.R. § 4110, 1968) provides that in instances where base property is transferred, the right follows it unless the grantor of the base saves the right by transferring it to other property of his which qualifies as base property. 43 C.F.R. § 4115.2-2 (1968).

Since the early days of the Act's administration, boards of local stockmen have worked in an advisory capacity with the local grazing district manager regarding district affairs. The district manager is required to seek the advice of the local permittees before promulgation of any rule or regulations affecting the administration of the district. 43 U.S.C. § 315o-1(b).

Though the government strongly relies on that provision of the Act which provides that the issuance of a permit "shall not create any right, title, interest, or estate in or to the lands" (43 U.S.C. § 315b), one commentator, in discussing that provision has made the following analysis thereof:

> "Essentially the Taylor Act seems to be a vehicle for implementing the policy of Congress to regulate the use of federal lands. It might be described as the earliest attempt at a resource use concept by Congress. To implement this regulation of the range, Congress provided for a system of regulating grazing use of federal land, such regulation to be administered locally through grazing districts, with the advice and recommendations of the local users. The regulated use would be implemented by the granting of exclusive use permits to livestock grazers who met the qualifications provided in the Act and the regulations of the Secretary. *The Act provided that these did not give vested rights in the land, but were privileges. But the question remains, what was meant by privileges?*" Ragsdale, *§3 Rights Under the Taylor Grazing Act*, 4 Land and Water L. Rev. 399 (1969)

As respondents have noted, petitioner contends that *United States v. Jaramillo*, 190 F.2d 300 (10th Cir. 1951) was wrong, relying on this court's navigational servitude cases, the most recent of which is *United States v. Rands*, 389 U.S. 121 (1967). There, the court held that the compensable value of private riparian fast lands taken by the government did not include its special value as a port site since the owner had no right of access to the navigable waters which could be legally protected as against the United States. Respondents contend that a careful examination of the rationale of the navigational servitude cases and the federal legislation regarding grazing permits gives rise to a basis for distinguishing the cases relied upon by the government. The result in *Rands* was bottomed upon the "unique" powers over navigable waters which the Constitution bestows upon the federal government:

> "The commerce clause confers a unique position upon the government in connection with navigable waters." The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress . . . This power to regulate navigation confers upon the United States a "dominant servitude," . . . which extends to the entire stream and the stream bed below ordinary high water mark. *The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. . . .*" 389 U.S. at 122-123.

In so holding, this court followed two earlier navigational servitude cases, *United States v. Chandler-Dunbar Water*

Power Co., 229 U.S. 53 (1913) and *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). The earlier case, *Chandler-Dunbar*, held that the riparian owner had no right to compensation for the value of its fast lands attributable to its suitability for use as a power site. The rationale for the decision is found in the following passage:

> "The government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner *who had no right to appropriate the current to his own commercial use.*" 229 U.S. at 76 (emphasis added)

In *Twin City*, the "dominant navigational servitude" was held to entitle the government to pay for land condemned without reference to the land's special value as a site for a hydroelectric power operation. As was the case in *Chandler-Dunbar*, the court's decision in *Twin City* was based upon the fact that the superior navigation easement "displaces all competing interests and appropriates the entire flow of the river for the declared public purpose." (350 U.S. at 225.) It is significant that the opinion in *Twin City*, makes plain that where Congress has chosen to legislate in such manner as to recognize certain rights or privileges in navigable streams, then the government is required to compensate for the destruction of such rights notwithstanding the fact that Congress had the Constitutional power to regulate navigable streams to the total exclusion of private rights:

> "The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its Constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under the state law should be compensable or otherwise recognized." 350 U.S. at 225

An example of Congressional recognition of rights in navigable streams is found in *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1934), where the Federal Water Power Act authorized diversion of waters of a navigable stream for power purposes. The effect of the legislation upon the dominant navigational easement was described as follows:

> "We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the government's dominant servitude, the government has not exercised its power to abolish them." 347 U.S. at 248

By allowing the deduction of the water right expenses in the company's accounting to the F.P.C., the court in *Niagara Mohawk*, supra, recognized the rights granted by the Act as something of value which value cannot be ignored by the government on the theory that it owns the whole stream to the exclusion of all other rights.

Herein lies one of the two critical distinctions between the instant case and the riparian fast lands cases like *Rands, Twin City* and *Chandler-Dunbar*. An analysis of the Congressional enactment creating, regulating and protecting respondents' grazing permits would lead to the conclusion that Congress exercised less than its constitutional power over public lands and recognized certain rights as against third parties and the government itself—at least enough of a "right to appropriate [the use of such lands] to their own commercial use". *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913). Thus, justification is found for the rule that fee lands of Taylor Grazing Act permittees cannot be taken without reference to the value added thereto by the grazing permits.

There exists another basis for distinguishing cases like *Rands, Twin City* and *Chandler-Dunbar*. In those cases the issue was whether the government was required to pay as compensation for lands taken some additional theoretical value thought to be represented by the use to which such lands could but had not yet been put, e.g., port sites, hydro-electric power operations. Not only had such developments and investments not, in fact, taken place, there was an absence of any kind of Congressional invitation, expressed or implied, to utilize the navigable waters as part of a private commercial enterprise.

That compensation will be found owing for the value represented by *investments actually made* at the request of the government in using public navigable waters is demonstrated by the court's decision in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). There the government was required to pay the going-concern value of a toll lock and dam built at the implied invitation of the government. The dispositive facts and rationale of the case are stated as follows in a subsequent decision of this court:

> "In the *Monongahela Nav. Co.* case the property which was taken was a lock and dam built by the company pursuant to the invitation of the United States and the state of Pennsylvania, the latter in consideration for giving the company a franchise to exact a toll.
>
> . . . .
>
> The lock and dam constituted, in effect, a going-concern whose value was, of course, affected by what it would produce." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923).

So also must respondents' ranch land and the rights represented by the federal grazing permits be considered as a "going-concern" the value of which is "affected by what it would produce". This is the kind of appraisal it would have

received by a willing and knowledgeable buyer in the market place. While recognizing that *Monongahela* has been read primarily for the proposition that the government is estopped from evaluing land taken without reference to improvements and investments made at the invitation of the government (*United States v. Rands* 389 U.S. at 126; *Omnia Commercial Co. v. U.S.* 261 U.S. at 513-14), the differences between that case and the one at bar are differences only of degree and not of substance.

Here Congress, through the Taylor Grazing Act, saw fit to permit, regulate and protect preferential grazing rights such as the respondents' in order to provide for the beneficial use of the public lands and to stabilize and strengthen the western cattle industry. To attempt to put a value upon respondents' fee lands without considering the actual "going concern value" as enhanced by the availability of the grazing permits is to deny that which exists in reality. This is the approach taken in *Monongahela.* No actual or justifiable reliance upon such a government program having taken place in *Rands, Twin City* or *Chandler-Dunbar,* those cases did not invoke that doctrine.

The government concedes that *Rands* is distinguishable from the instant case because the government's navigational servitude is absolute while private rights bestowed under the Taylor Grazing Act make the government's rights in grazing lands less absolute. (Brief of Pet. 14-15) There can be no argument, therefore, that what application Rands has or had to the facts of the instant case was merely an application by analogy and thus the imposition upon the instant facts of the rationale of *Rands* is particularly inappropriate in view of subsequent legislation.

Congress, in enacting § 111 of the River and Harbor Act of 1970, 84 Stat. 1821, 33 U.S.C. 595a, specifically provided:

"In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property to be taken by the United States above the normal high water mark of navigable waters of the United States *shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. . . .*" 84 Stat. 1821, 33 U.S.C. § 595a *(emphasis supplied)*

The Brief of Petitioner, in discussing this Congressional enactment, which applies a test for evaluation nearly identical to that with which the jury was charged in the instant case, attempts to minimize the significance of that enactment by pointing out that 33 U.S.C. 595a refers only to takings for improvement of navigable rivers and waterways while *Rands* dealt with riparian taking for hydroelectric projects or any other purpose.

Clearly, both *Rands* and the subsequent Congressional enactment, 33 U.S.C. 595a, both refer to riparian takings and are therefore factually distinguishable from the instant case. Thus the government must concede that it is only *by analogy* that either *Rands* or 33 U.S.C. 595a would have any application in the determination of this case. The petitioner appears to overlook the crucial fact that 33 U.S.C. 595a represents a Congressional "setting aside" of the onerous rule of *Rands* thereby *eroding the rationale of Rands* as authority for denying an evaluation to be placed upon fee lands due to their contiguity to navigable streams or, in this case, grazing permit lands.

The fact which must not be forgotten is that the issue in this case is not whether a rancher has a Fifth Amendment right to compensation for the taking of a grazing permit but whether the availability of *unrevoked* Taylor Grazing Act permits can be considered by the jury under proper instructions in determining the value of the private fee lands actually taken by the government. By instructing the jury that they could do so the trial court correctly followed the principles of the only federal decision on point, *United States v. Jaramillo* 190 F.2d 300 (10th Cir. 1951) As in *Jaramillo,* respondents' grazing permits had not been revoked or cancelled at the time the fee land and state lease lands were taken by right of eminent domain. Thus respondents should be permitted to value or establish the carrying capacity of their fee land as it was actually developed and utilized, that is, in conjunction of the surrounding federal grazing lands. Only in this manner can respondents be given the full and perfect equivalent in money of the property taken and be "put in as good a position pecuniarily as they would have occupied if their property had not been taken. *United States v. Miller* 317 U.S. 369, 373 (1943).

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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No. 71-559

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1971

UNITED STATES OF AMERICA, PETITIONER

-vs-

CHESTER FULLER AND MAXINE FULLER

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF FOR MONTANA PUBLIC LANDS COUNCIL IN SUPPORT OF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

TABLE OF CONTENTS

	Page
Opinion below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Argument:	
I. The test of "market value" should be applied in this case	2
II. The United States may be charged for value attributable to it or brought about by government policy	3
III. Lower court should be upheld if governmental policy is to be consistent	7
IV. Public policy and economic considerations	10
Conclusion	10

CITATIONS

Cases

Iriarte v. United States, 147 F.2d 105	4,5,6
Shoemaker v. United States, 147 U.S. 282	3
United States v. Citrus Valley Farm, Inc., 350 F.2d 683	6,7
United States v. Cors, 337 U.S. 325	3
United States v. Miller, 317 U.S. 369	3

CITATIONS (cont.)

Cases

United States v. Reynolds,
397 U.S. 14 . . . . . .

Statutes

7 U.S.C., Sec. 1341, et seq.,
Agricultural Adjustment Act . . . . . .

28 U.S.C. 1254(1), ...

43 U.S.C. 315,
Taylor Grazing Act . . . . . .

Miscellaneous

Regulation 20.2031-1(b),
Internal Revenue Service . . . . . .

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AMICUS CURIAE BRIEF FOR MONTANA PUBLIC LANDS COUNCIL IN SUPPORT OF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Montana Public Lands Council hereby submits its brief in support of the decision of the United States Court of Appeals for the Ninth Circuit in this matter. Montana Public Lands Council is an unincorporated association of persons and corporations engaged or interested in the livestock industry. Montana Public Lands Council has a staff of officers and directors.

OPINION BELOW

The opinion of the court of appeals is reported at 442 F.2d 504.

JURISDICTION

The jurisdiction of this court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the owner of land taken by the United States is entitled to have included in the measure of his compensation the value of grazing permits on adjoining federal lands or, stated another way, is the owner of lands taken by the United States entitled to be compensated for said lands on the basis of their value as enhanced by the appurtenant grazing rights or permits?

STATUTE INVOLVED

The Taylor Grazing Act, 43 U.S.C. 315, and following, as amended.

STATEMENT

Statement of Petitioner, the United States, in its brief is sufficient for our purposes.

ARGUMENT

I.

THE TEST OF "MARKET VALUE" SHOULD BE APPLIED IN THIS CASE

We submit that the ultimate question here is whether or not "market value" is somehow determined differently in a condemnation action brought by the United States than it is in the ordinary dealings between private parties. Specifically, is the market value of the lands owned by Mr. and Mrs. Fuller one amount if sold to a private party or if condemned by, say, the State of Arizona, and some other amount if taken by the United States? The cases do not indicate this. In United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, the court said that private property shall not be taken for public use without just compensation, and that this is measured by "market value fairly determined." As the court knows, there are many condemnation cases making substantially the same holding. Petitioner is, in effect, asking the court to apply a different standard in the case at bar.

II.

THE UNITED STATES MAY BE CHARGED FOR VALUE ATTRIBUTABLE TO IT OR BROUGHT ABOUT BY GOVERNMENT POLICY

Petitioner asserts in its brief (page 12) that in determining the landowner's constitutionally guaranteed just compensation, the United States is not to be charged for values which it has created. Petitioners cite in support of this statement, *United States v. Cors*, 337 U.S. 325, *Shoemaker v. United States*, 147 U.S. 282, *United States v. Miller*, 317 U.S. 369, and *United States v. Reynolds*, 397 U.S. 14. These cases, we submit, are not in point because they deal with circumstances entirely different than those presented

to the court in the case at bar. The value created by the government in the cases cited by petitioner had to do with the value increase brought about by the government's action in taking the property and by the government's need for the property. That is not the situation here. If petitioner's argument were to be upheld in this case, then it could be said that the enhanced value of private property brought about by its proximity to some federal facility could not be considered in a condemnation action brought by the United States. For example, it is commonly thought that certain commercial locations close to a post office are desirable or that recreational facilities close to a national park are desirable. Would petitioner argue that somehow the increment in value to those properties by virtue of their locations would have to be determined and not considered in a condemnation action brought by the United States? We submit that petitioner's argument on this point is untenable.

Section 3 of the Taylor Grazing Act does, in fact, provide that a permit does not create any estate in or to the lands. However, we submit that this does not require a holding that the value of the private lands cannot be enhanced by the grazing rights on the public domain. We submit that the proposition spelled out in the case of *Iriarte v. United States*, 147 F.2d 105, 167 ALR 494 (C.A.1), is applicable here. That was a situation where the government condemned for military purposes 33 acres of land fronting on San Juan harbor. It was contended that there was a well known policy of the United States with reference to dredging in navigable waters if and when commercial needs

required additional facilities in any particular locality, and that the land should be valued accordingly. In the *Iriarte* case the court said:

> ". . . an increment added to the value of land by a governmental policy is not to be deducted from the fair market value of land condemned in order to arrive at the amount of the just compensation which must be paid therefor. And this indication is supported by practical considerations. For instance, it would obviously be impossible as a practical matter to deduct from the fair market value of agricultural land all elements of its value due to the Government's agricultural policy. Many other similar elements of value might be mentioned, even the element of value inhering in all property as a result of the Government's defense policy. However, we think enough has been said to warrant the conclusion that the criterion of fair market value is to be applied without subtraction from the result thereby obtained of any elements of value resulting from the general policies of the Government."

The court went on to say:

> "But before any governmental policy can be considered as affecting the market value of property, there must be evidence to indicate that the existence of that policy would be taken into consideration by the willing buyer and the willing seller whose bargain is the test of value."

So, in the *Iriarte* case, although the court determined that the general governmental policy in question was not applicable, the proposition mentioned was enunciated.

We submit that the use of the public domain for livestock grazing purposes is not only a government policy, but is a statutory enactment as embodied in the Taylor Grazing

Act. The fact that grazing permits may be revoked or withdrawn by the sovereign does not destroy the existence of the policy as enacted into law by Congress. The government policy of dredging harbors, as in the *Iriarte* case, could, no doubt, be terminated at any time also. Further, the case at bar presents an even stronger situation than the *Iriarte* case because here the use of the public domain for grazing was and is a fact in existence. The land was being used for that purpose, while in the *Iriarte* situation the land involved was not then a harbor site.

In another case, *United States v. Citrus Valley Farms, Inc.*, 350 F.2d 683 (C.A. 9), the court held that a trial court instruction was correct, a portion of such instruction being quoted below:

> "If the preponderance of the evidence shows that the governmental policy which I have described, that is, the right to a cotton allotment, enhanced the value of Citrus Valley Farm on July 1, 1959, the jury should give effect thereto in its determination of fair market value.
>
> "However, it must be borne in mind that defendant is entitled to be compensated only for that which was taken from him by the Government. It is a part of the governmental policy respecting cotton allotments, as expressed in Section 1378 of the Agricultural Adjustment Act, that, if a cotton farm is condemned, the owner has a personal right within three years to re-establish and use the cotton allotment on other farms to be acquired and owned by the displaced owner, subject to the county average allocations of the county

> or counties in which the new farm or farms are located. This has sometimes been referred to during the trial as the Section 1378 right.
>
> "If you find from a preponderance of the evidence that the cotton allotment rights retained by defendant and not taken by the Government, in accordance with Section 1378, had a pecuniary value to the defendant, it follows that insofar as the cotton allotment affected the market value of Citrus Valley Farm on July 1, 1959, the just compensation to which defendant is entitled is something less than defendant would have received if he had voluntarily sold the farm with the cotton allotment to a willing buyer."

The allotment was transferable to other lands, so the jury was instructed to determine the value of the cotton allotment separately. In the case at bar that element is not present. The *Citrus Valley* case is important because of the holding that the value of the land may be enhanced by a governmental policy, to-wit: the right to a cotton allotment and that a jury may consider that item in arriving at just compensation. In the *Citrus Valley* case, the government policy was embodied in the Agricultural Adjustment Act, 7 U.S.C., Section 1341, et seq.

III.

LOWER COURT SHOULD BE UPHELD IF GOVERNMENTAL POLICY IS TO BE CONSISTENT

Internal Revenue Service Regulation 20.2031-1(b) states in part:

> "The value of every item of property includible in a decedent's gross estate under sections

> 2031 through 2044 is its fair market value at the time of the decedent's death, except that if the executor elects the alternate valuation method under section 2032, it is the fair market value thereof at the date, and with the adjustments, prescribed in that section. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."

This definition is certainly consistent with the condemnation cases. As between buyers and sellers, the carrying capacity or number of livestock that a ranch will support is one of the principal items of concern in determining price. Although we are unable to locate any written regulations or policies wherein the Internal Revenue Service states specifically that grazing rights or permits on the public domain are to be considered in valuing a ranch for estate purposes, they are necessarily a factor because of the definition of "fair market value" contained in the regulations. It is common knowledge that as between buyers and sellers of livestock ranches, the grazing rights or permits are of major import.

We submit that it would be inconsistent for the government to tax grazing rights or permits on the one hand and, on the other, to say that they have no value. If the government's position in the case at bar were adopted by the court, a situation could very well develop where a ranch would be valued for estate tax purposes as enhanced by the existence of grazing privileges, and within a short time thereafter paid for by the United States, in a condemnation action, at a price which would be a fraction of the value

for estate tax purposes.

Another area where a government agency places value on grazing rights is found in the loan policy of the Farmers Home Administration. Here again, we have been unable to locate specific written regulations or policy stating that grazing rights are to be considered in valuing a ranch. It is common knowledge and it is obvious that the practice is followed, however. The Farmers Home Administration uses "fair market value" in their loan appraisals. The Farmers Home Administration has financed many grazing associations in the western part of the country in recent years. Most of those in the state of Montana are made up of private lands, state lease lands, and federal lands. One of the most recently formed grazing associations in northeastern Montana was the Wittmayer Grazing Association, to which the United States, through the Farmers Home Administration, loaned the sum of $900,000.00 for the purpose of purchasing a ranch. The ranch purchased was made up of lands, approximately ten percent of which were privately owned by the sellers, and the greater portion of the balance was federal lands administered by the Bureau of Land Management. The Farmers Home Administration loaned virtually the entire purchase price of the ranch. It was obvious that the Farmers Home Administration placed great emphasis on the value of the lands as enhanced by the grazing rights. Grazing associations of this kind are made up of individual members. It staggers the mind to contemplate the effect on the members of the grazing association should the United States, sometime in the future, condemn the lands and not

be required to pay for the value of the private lands as enhanced by the grazing rights. It would be inconsistent for the government to value a ranch for loan purposes under one standard and adopt an entirely different standard for valuation in condemnation proceedings.

IV.

PUBLIC POLICY AND ECONOMIC CONSIDERATIONS

Buyers and sellers of ranches, lendors of money, government and private, have come to rely upon the fact that livestock ranches are enhanced in value by virtue of the grazing rights appurtenant to them. The financial community and the livestock industry have developed a confidence in the stability of livestock operations which make use of grazing rights under the Taylor Grazing Act. To adopt the position advanced by the government in the case at bar would, it is submitted, seriously undermine this confidence, to the detriment of the livestock industry.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-559

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In our opening brief we discussed two reasons why, when part of a cattle operator's fee land is taken for public use, the Fifth Amendment does not require that he be paid, above the value of the land itself, for the value formerly added to his land by the grazing of revocable grazing permits. First, the Fifth Amendment requires compensation for the taking of property, and revocable grazing privileges on the public domain are not property interests. Second, the value of permitted grazing on public land is a special value—in effect, a subsidy to the cattleman—created by the United States, for which

472-203

it is not required to pay in the award of just compensation to the adjoining landowner.

Respondents, on the other hand, rely principally on the proposition that the existence of grazing permits on public lands has substantial value in the marketing of adjoining ranch lands. The Montana Public Lands Counsel, a livestock producers' association, has filed an *amicus curiae* brief in support of respondents that charges the government with inconsistency in adhering to the market value standard for tax and loan evaluation purposes, but deviating from that standard in condemnation.

1. We have no quarrel with the statement that in condemnation as in tax evaluations the general standard is fair market value. But there are important exceptions to this principle in the law of eminent domain, which reflect significant differences in purpose from tax or mortgage valuation. As *United States* v. *Miller*, 317 U.S. 369, 375, makes clear, not every factor weighed in market transactions is a Fifth Amendment ingredient for which the United States must pay when it condemns property. An example is value added by the government.

In eminent domain, in which money is taken from the public fisc to compensate a private person, it is just for the public to subtract from market value the value it has already directly added to the private property. Otherwise the public would pay twice for the same value—once when it conferred it and again when it compensated the owner for the increased value. In tax cases, to the contrary, if the government

has increased the value of the taxpayer's property that is all the more reason why the taxpayer, having received a benefit, should be taxed on the full value of his property. The situations are opposite rather than parallel, and it is proper that a different rule is applied to each.[1]

2. Similarly, elements of value considered in mortgage financing are not determinative of the United States' obligation to pay just compensation upon condemnation. Credit transactions are particularly unreliable as an indicator of just compensation because they depend upon many uncertain and non-transferable factors, such as commercial speculation, personal managerial ability, and the honesty and financial ability of the borrower.[2] See *Mandl* v. *City of Phoenix*, 41

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[1] If a comparison is made between valuation for property tax purposes and valuation for eminent domain, the fallacy of seeking a single rule for taxation and eminent domain valuation—or even for different kinds of tax valuation—is especially clear. Because of the different considerations involved in tax assessments, leading generally to undervaluation, the great weight of authority is that tax assessed valuation of land is not even admissible as evidence of market value in eminent domain cases. *Murdock* v. *United States*, 160 F.2d 358, 362 (C.A. 8); *Bowie Lumber Co.* v. *United States*, 155 F.2d 225, 228 (C.A. 5); *United States* v. *Certain Parcels of Land in the County of Arlington*, 261 F.2d 287, 289–291 (C.A. 4).

[2] The Federal Housing Administration prescribes consideration of three risk factors: (1) property; (2) location; and (3) borrower. See McMichael's *Appraisal Manual* (4th Ed. 1964) c. 11, "Appraising the Moral Risk—Rating the Borrower," p. 151. Five chapters (7–11) of this manual are devoted to risk factors.

Ariz. 351, 355–356; *McInnis, et al.* v. *Brown County Water Improvement Dist. No. 1,* 41 S.W.2d 741 (Tex. Civ. App.). Moreover, the availability of federal financing has properly been rejected as a measure of value in condemnation, because it involves valuation on a "business venture basis." *United States* v. *Certain Property, Borough of Manhattan,* 374 F.2d 138 (C.A. 2). The fact that the cattle and loan industries assign value to the availability of grazing permits is not at all inconsistent with our position, but to the contrary, makes clear the subsidy already provided cattle operators and the impropriety of increasing that subsidy by elevating it to the status of a compensable property right contrary to the express terms of the statute that creates it.[3]

3. The respondents contend (Br. 9) that a landowner is entitled to have his land valued with respect to its environment, including environmental values created by general governmental policy, such as the establishment of schools, roads, and other public amenities. We do not dispute this proposition with respect to benefits generally available to the public. Grazing permits, however, afford individual cattle operators a special privilege to use a portion of the public domain to the exclusion of everyone else. And Congress has specifically declared that this privilege

[3] 43 U.S.C. 315b. See *LaRue* v. *Udall,* 324 F. 2d 428 (C.A. D.C.), in which the court rejected an attempt by cattle operators, who had pledged preferential grazing rights as security for a loan, to convert their grazing privileges into property rights so as to block the Secretary's approval of an exchange of public grazing land.

"shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b.

This case differs significantly from *United States* v. *Citrus Valley Farms, Inc.*, 350 F. 2d 683 (C.A. 9), cited by the *amicus* (Br. 6–7). There, no use of the public domain was involved and the cotton allotment, rather than being a direct subsidy, was an absence of restriction or a partial restriction. Under the applicable statute (7 U.S.C. 1378), the allotment was transferable to other land the appellant might own and the case turned on the valuation of this transferable right. In *Iriarte* v. *United States*, 157 F. 2d 105 (C.A. 1), also relied on by the *amicus* (Br. 4–6), the court stated that value added by the "general policies of the Government" (*id.* at 111) must be included in the value of the land taken, but rejected a claim for added value as a result of possible government dredging. To the extent that the case can be read to imply that special values adhering to property as a result of possible use of public land or waters must be included in the government's just compensation (and it is not clear to us that it goes that far), then it is inconsistent with this Court's decisions in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Rands*, 389 U.S. 121.

In short, this case does not involve the question of the consideration to be given general environmental factors or general governmental policies which might enhance the value of land taken. The question here is whether the government must pay for a special, per-

mitted (but by statute revocable) use of public land adjacent to the land taken. There is, as explained in our principal brief, no difference in principle between this case and *United States* v. *Rands, supra.*

4. The *amicus* also states (Br. 10) that the financial community and the livestock industry have developed confidence in the stability of livestock operations which make use of grazing privileges under the Taylor Grazing Act. The decision we seek in this case will not destroy that confidence. As we state in our opening brief (pp. 18–20), rather than stabilizing the industry or achieving the purpose of the Taylor Grazing Act, attaching compensability to the value of grazing privileges would inhibit the government in the granting and maintenance of these revocable permits.

CONCLUSION

For the foregoing reasons, and for those set forth in our main brief, the judgment of the Court below should be reversed.

Respectfully submitted.

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OCTOBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* FULLER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-559. Argued October 18, 1972—Decided January 16, 1973

In a condemnation proceeding brought by the United States, respondents made a claim, which the District Court and Court of Appeals upheld, to compensation for enhanced value on the open market because of use of the condemned fee lands in conjunction with adjoining federal lands for which respondents held permits under the Taylor Grazing Act. *Held:* The Fifth Amendment requires no compensation for any value added to the fee lands by the permits, which are revocable and, by the Act's terms, create no property rights. Pp. 2–5.

442 F. 2d 504, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–559

United States, Petitioner, *v.* Chester Fuller et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 16, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents operated a large-scale "cow-calf" ranch near the confluence of the Big Sandy and Bill Williams Rivers in western Arizona. Their activities were conducted on lands consisting of 1,280 acres which they owned in fee simple ("fee lands"), 12,027 acres leased from the State of Arizona, and 31,461 acres of federal domain held under Taylor Grazing Act permits issued in accordance with 43 U. S. C. § 315b. The Taylor Grazing Act authorizes the Secretary of the Interior to issue permits to livestock owners for grazing their stock on Federal Government lands. These permits are revocable by the Government. The Act provides, moreover, that its provisions "shall not create any right, title, interest, or estate in or to the lands." *Ibid.*

The United States, petitioner here, condemned 920 acres of respondents' fee lands. At the trial in the District Court for the purpose of fixing just compensation for the lands taken, the parties disagreed as to whether the jury might consider value accruing to the fee lands as a result of their actual or potential use in combination with the Taylor Grazing Act "permit" lands. The Government contended that such element of incremental value to the fee lands could neither be taken into con-

sideration by the appraisers who testified for the parties nor considered by the jury. Respondents conceded that their permit lands could not themselves be assigned any value in view of the quoted provisions of the Taylor Grazing Act. They contended, however, that if on the open market the value of their fee lands was enhanced because of its actual or potential use in conjunction with permit lands, that element of value of the fee lands could be testified to by appraisers and considered by the jury. The District Court substantially adopted respondents' position, first in a pretrial order and then in its charge to the jury over appropriate objection by the Government.

On the Government's appeal, the Court of Appeals for the Ninth Circuit affirmed the judgment and approved the charge of the District Court. That court followed the earlier case of *United States* v. *Jaramillo*, 190 F. 2d 300 (CA10 1951), and distinguished our holding in *United States* v. *Rands*, 389 U. S. 121 (1967). The dissenting judge in the Ninth Circuit thought the issue controlled by *Rands, supra*. We granted certiorari. 404 U. S. 1037 (1972).

Our prior decisions have variously defined the term "just compensation" which the Fifth Amendment requires to be made when the Government exercises its power of eminent domain. The owner is entitled to fair market value, *United States* v. *Miller*, 317 U. S. 369, 374 (1943), but that term is "not an absolute standard nor an exclusive method of valuation." *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961). The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 124 (1950), as its does from technical concepts of property law.

The record shows that several appraiser witnesses for respondents testified that they included as an element

of the value which they ascribed to respondents' fee lands the availability of respondents' Taylor Grazing Act permit lands to be used in conjunction with the fee lands. Under the District Court's charge to the jury, the jury was entitled to consider this element of value testified to by the appraisers. This Court has held that generally the highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may be taken into consideration in valuing the parcel taken. *Olson* v. *United States*, 292 U. S. 246, 256 (1934). The question presented by this case is whether there is an exception to that general rule where the parcels to be aggregated with the land taken are themselves owned by the condemnor and used by the condemnee only under revocable permit from the condemnor.

To say that this element of value would be considered by a potential buyer on the open market, and is therefore a component of "fair market value," is not the end of the inquiry. In *United States* v. *Miller*, *supra*, this Court held that the increment of fair market value represented by knowledge of the Government's plan to construct the project for which the land was taken was not included within the constitutional definition of "just compensation." The Court there said:

> "But [respondents]insist that no element which goes to make up value . . . is to be discarded or eliminated. We think the proposition is too broadly stated. . . ." 317 U. S., at 374.

United States v. *Cors*, 337 U. S. 325 (1949), held that the just compensation required to be paid to the owner of a tug requisitioned by the Government in October 1942, during the Second World War, could not include the appreciation in market value for tugs created by the Government's own increased wartime need for such vessels. The Court said: "That is a value which the Gov-

ernment itself created and hence in fairness should not be required to pay." 337 U. S., at 334. A long line of cases decided by this Court dealing with the Government's navigational servitude with respect to navigable waters evidences a continuing refusal to include, as an element of value in compensating for fast lands which are taken, any benefits conferred by access to such benefits as a potential port site or a potential hydro-electric site. *United States* v. *Rands*, 389 U. S. 121 (1967); *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956); *United States* v. *Commodore Park, Inc.*, 324 U. S. 386 (1945).

These cases go far towards establishing the general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value which the Government has created, or which it might have destroyed under the exercise of governmental authority other than the power of eminent domain. If, as in *Rands*, the Government need not pay for value which it could have acquired by exercise of a servitude arising under the commerce power, it would seem *a fortiori* that it need not compensate for value which it could remove by revocation of a permit for the use of lands which it owned outright.

We do not suggest that such a general principle can be pushed to its ultimate logical conclusion. In *United States* v. *Miller*, *supra*, the Court held that "just compensation" did include the increment of value resulting from the completed project to neighboring lands originally outside the project limits, but later brought within them. Nor may the United States "be excused from paying just compensation measured by the value of the property at the time of taking" because the State in which the property is located might, through the exercise of its lease power, have diminished that value without paying

compensation. *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 284 (1943).

"Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings." *United States* v. *Miller*, 317 U. S., at 375. Seeking as best we may to extrapolate from these prior decisions such a "working rule," we believe that there is a significant difference between the value added to property by a completed public works project, for which the Government must pay, and the value added to fee lands by a revocable permit authorizing the use of neighboring lands which the Government owns. The Government may not demand that a jury be arbitrarily precluded from considering as an element of value the proximity of a parcel to a post office building, simply because the Government at one time built the post office. But here respondents rely on no mere proximity to a public building or to public lands dedicated to, and open to, the public at large. Their theory of valuation aggregates their parcel with land owned by the Government to form a privately controlled unit from which the public would be excluded. If as we held in *Rands*, a person may not do this with respect to property interests subject to the Government's navigational servitude, he surely may not do it with respect to property owned outright by the Government. The Court's statement in *Rands* respecting port-site value is precisely applicable to respondents' contention here that they may aggregate their fee lands with permit lands owned by the Government for valuation purposes:

> "[I]f the owner of fast lands can demand portsite value as part of his compensation, 'he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. . . . To require the United States to pay

> for this . . . value would be to create private claims in the public domain.'" 389 U. S., at 121, quoting *United States* v. *Twin City Power Co.*, 350 U. S. 222, 228 (1956).

We hold that the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with the Government's permit lands.

The Court of Appeals based its holding in part on its conclusion that although the Fifth Amendment might not have required the Government to pay compensation of the sort permitted by the trial court's charge to the jury, the history of the Taylor Grazing Act indicated that Congress had intended that such compensation be paid. Congress may, of course, provide in connection with condemnation proceedings that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950). But we do think the factors relied upon by the Court of Appeals fall far short of the direction contained in the Reclamation Act of 1902 that payment be made for rights recognized under state law which was determinative of the outcome in *Gerlach*. The provisions of the Taylor Grazing Act quoted *ante* make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of the permit. Given that intent it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands by their potential use in connection with permit lands. We find no such authorization in the applicable congressional enactments.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-559

United States, Petitioner, v. Chester Fuller et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 16, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I dissent from a decision which in my view dilutes the meaning of the just compensation required by the Fifth Amendment when property is condemned by the Government. As a full understanding of the facts is necessary, I will begin by restating them.

This is a condemnation proceeding brought by the United States to acquire title to 920 of 1,280 acres of land, owned in fee by respondents, which is within the area to be flooded by a dam and reservoir project in Arizona. At the time of the taking respondents used this fee land as a base for a cattle operation known as a "cow-calf" ranch. A dependable source of water allowed intense cultivation of the fee land to provide the basic source of feed for the cattle. In connection with their fee land, respondents used 31,461 acres of adjacent public land on which they held revocable grazing permits issued under the Taylor Act. 43 U. S. C. § 315.[1] The public land was used for grazing during favorable seasons, and roads running across the public land connected respondents' three parcels of fee land.

The permits held by respondents on the public land accorded exclusive but revocable grazing rights to re-

[1] In addition, respondents grazed their cattle on 12,027 acres of land leased from the State, but this land is not relevant to the controversy now before us.

spondents. By the terms of the Act, the issuance of a permit does not "create any right, title, interest or estate in or to the lands." 43 U. S. C. § 315b. Nonetheless, grazing permits are of considerable value to ranchers and serve a corresponding public interest in assuring the "most beneficial use" of range lands. *Hatahley* v. *United States*, 351 U. S. 173, 177 (1956). Respondents' permits had not been revoked at the time of the taking, nor, so far as the record reveals, have they yet been revoked. The record also shows that only a small fraction of the public grazing land will be flooded in the dam and reservoir project. Thus, the public land which respondents assert gave added value to their fee land remains substantially intact and available for Taylor Act purposes.

The District Court allowed respondents to introduce testimony as to the market value of the fee land which took into consideration its proximity to this public land. In relevant part, the District Court instructed the jury as follows:

> "During the course of this trial, reference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or canceled at any time without a constitutional obligation to pay the compensation therefor.
>
> "Evidence has been introduced of defendants' use of their deeded land which is being taken, in conjunction with surrounding land owned by the United States, for which defendants have grazing permits,

and land belonging to the State of Arizona, which defendants leased. In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or the State of Arizona. However, in determining the value of the fee land and in awarding compensation to the owners, you should consider the availability and accessibility of the permit and leased land and its use in conjunction with the fee land taken and give to the fee land such value as, in your judgment, according to the evidence, should be given on account of such availability and accessibility of the permit and leased land, if any. You should also consider the possibility that the permits on the United States land could be withdrawn at any time without constitutional obligation to pay compensation therefor and determine the effect you feel such possibility according to the evidence, would have upon the value of the fee land." Pet. App., pp. 26–27.

I have reproduced this extensive excerpt to underline the careful manner in which the condemnation jury was instructed. Contrary to the implication in the Government's framing of the question in this case,[2] the

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[2] As stated by the Government, the question presented by this case is:

"Whether the owner of land taken by the United States is entitled to have included in the measure of his compensation the value of revocable grazing permits on adjoining federal lands issued under an act of Congress which specifies that such grazing permits create no 'right, title, interest or estate in or to the lands.'" Pet. Br., p. 2.

More accurate, in light of the District Court's instruction, is respondents' statement of the question:

"Whether, in determining the compensation due an owner of land taken by the United States, the jury may consider the availability

jury was not allowed to include "the value of revocable grazing permits." The instruction expressly stated that "such permits are mere licenses which may be revoked and are not compensable as such." The emphasis of the instruction was on the location of the fee land, with the resulting "availability and accessibility" of the adjacent public grazing land. I find the instruction to be an appropriate statement of the applicable principles of just compensation.

The opinion of the Court recognizes that the just compensation required by the Fifth Amendment when the Government exercises its power of eminent domain is ordinarily the market value of the property taken. *United States* v. *Miller*, 317 U. S. 369, 374 (1943). It is commonplace, in determining market value—whether in condemnation or in private transactions—to consider such elements of value as derive from the *location* of the land. But today the Court enunciates an exception to these recognized principles where the value of the land to be condemned may be enhanced by its location in relation to Government owned property. The Court relies on two lines of cases which, indeed, are said to go far toward establishing:

> "the general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value which the Government has created, or which it might have destroyed under the exercise of governmental authority other than the power of eminent domain." *Supra*, p. —.

Applying this new principle to the present case, the Court now holds that since the Government "created" an element of value by owning grazing land and making

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and accessibility of public lands, so long as consideration is also given to the possibility that the grazing permits on the public land may be withdrawn." Resp. Br., p. 1.

it available under the Taylor Act, and since it has the power to "destroy" this element of value by barring respondents and others from the land, the condemnation jury must ignore the fact that respondents' land is adjacent to public land. Under this formulation it is quite immaterial that the grazing land remains substantially intact, and that the Government has taken no action—and none is shown to be contemplated in the record—to convert such land to some other use. The test is not whether the Government has in fact put its property to some other use or removed it entirely; rather, it is quite simply whether the Government has the power to do this.

Neither of the lines of cases on which the Court relies seems apposite. The first includes *United States* v. *Miller, supra,* in which the Court held that the Government need not pay for an increase in value occasioned by the very project for which the land was condemned, and *United States* v. *Cors,* 337 U. S. 325 (1949), in which the Court held that in condemning tugboats during wartime the Government need not offer compensation for an increase in value attributable to its own extraordinary wartime demand for such craft. These cases support only the modest generalization that compensation need not be afforded for an increase in market value stemming from the very Government undertaking which led to the condemnation.

The other cases on which the Court relies, *United States* v. *Rands,* 389 U. S. 121 (1967), and *United States* v. *Twin City Power Co.,* 350 U. S. 222 (1956), deal with the condemnation of lands adjacent to navigable waters. In *Rands,* the condemnee owned land on the Columbia River which the United States condemned "in connection with the John Day Lock and Dam Project, authorized by Congress as part of a comprehensive plan for the development of the Columbia River." 389 U. S., at 122.

Relying on the "unique position" of the Government "in connection with navigable waters," *ibid.*, the Court held that no special element of value could be accorded the land by virtue of its possible use as a port. In *Twin City*, the condemnee was holding land on the Savannah River as a potential hydro-electric power site. The Government condemned the land as part of a major flood control, navigation, and hydro-electric project. By a bare majority vote, the Court held that the condemnee was not entitled to the "special water rights value" of the land as a potential power site, distinguishing other cases with the comment:

> "We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river. . . ." 350 U. S., at 225.

The water rights cases may be subject to varying interpretations, but it is important to remember when interpreting them that they cut sharply against the grain of the fundamental notion of just compensation, that a person from whom the Government takes land is entitled to the market value, including location value, of the land. They could well be confined to cases involving the Government's "unique position" with respect to "navigable waters." [3] At most these cases establish a

[3] Arguably, then, these are water rights cases and nothing more. Suitable sites for hydroelectric plants or port facilities are important natural resources, highly valuable but limited in number, over which the Government has peculiar historical and constitutional sway. On this view, while the Government has equal authority over Taylor Act land and other Government-owned property, proximity to such property may appropriately be treated differently from proximity to navigable water for the purpose of measuring just compensation. This was one of the bases on which the court below distinguished the water cases from the present case, 442 F. 2d 504, 507 (CA9 1971), and in my view is an alternative ground for affirming the judgment below.

principle no broader than that the Government need not compensate for location value attributable to the proximity of Government property utilized in the same project. In *Rands*, as in *Twin City*, the river adjacent to the property condemned was the focal point of the development project which led to the condemnation. The Government simply decided to put the river to a new use and in connection with that new use condemned adjacent land.

To understand why compensation is not required in such cases, it is important to distinguish the Government's role as condemnor from its role as property owner. While as condemnor the Government must pay market value, as property owner it may change the use of its property as if it were a private party, without paying compensation for the loss in value suffered by neighboring land.

When the Government condemns adjoining parcels of privately owned land for the same project, it may not take advantage of a drop in market value of one parcel resulting from the decision to condemn another. When, however, as in *Rands* and *Twin City*, a project encompasses not only parcels of private land, but also the public property which enhances the value of the private land, a more difficult question is presented. In each of those cases, the Government held a dominant servitude over the flow of a river, and it condemned adjacent private lands in connection with a decision to exercise its servitude. Arguably, the measure of compensation for the taking of the private lands should have included the value of the riparian location unaffected by the Government's decision to exercise its own rights in the river. But this result would have impinged on the Government's right to use the river by raising the cost of any new use which required the condemnation of private land.

Accordingly, in those cases the Court excluded evidence of riparian location value since the Government was exercising its lawful power to appropriate "the entire flow of the river."

> "The proper exercise of this power [over navigable waters] is not an invasion of any private rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from a lawful exercise of a power to which the interests of riparian owners have always been subject." *United States* v. *Rands*, *supra*, 389 U. S., at 123.

In any event, the present case is quite different. Respondents' lands were condemned not because the Government as property owner decided to put its grazing land to some other use and needed additional land, but rather because the Government wanted respondents' land for a project which left the grazing land substantially intact and available.[4]

The Government's role here is not an ambiguous one—it is simply a condemnor of private land which happens to adjoin public land. If the Government need not pay location value in this case, what are the limits upon the

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[4] In two cases decided together involving the condemnation of ranch land used in connection with Taylor Act land, a panel of the Tenth Circuit Court of Appeals followed a similar analysis in awarding location value in one case, *United States* v. *Jaramillo*, 190 F. 2d 300 (1951), but not in the other, *United States* v. *Cox*, 190 F. 2d 293 (1951). In *Jaramillo*, the court stated:

"By appropriate condemnation proceedings, . . . the Government took appellee's fee and leased land as part of a total of 20,061 acres, to be used for war purposes. But, *unlike the Cox and Beasley cases, the project did not contemplate the acquisiton of the forest land covered by appellee's permit.*" (Emphasis added.) 190 F. 2d, at 301.

principle today announced? Will the Government be relieved from paying location value whenever it condemns private property adjacent to or favorably located with respect to Government property?[5] Does the principle apply, for example, to the taking of a gasoline station at an interchange of a federal highway, or to the taking of a farm which in private hands could continue to be irrigated with water from a federal reservoir? The majority proposes to distinguish such cases with the "working rule" that:

> "there is a significant difference between the value added to property by a completed public works project, for which the Government must pay, and the value added to fee lands by a revocable permit authorizing the use of neighboring lands which the Government owns." *Supra*, p. —.

The Court can hardly be drawing a distinction between Government-owned "completed public works" and Government-owned parks and grazing lands in their natural state. The "working rule" as articulated can, therefore, only mean that the respondents' revocable permit to use the neighboring lands is regarded by the Court as the distinguishing element. This is an acceptance of the Government's argument that the added value derives from the permit and not from the favorable location with respect to the grazing land.[6] The answer to this, not addressed either by the Government or the Court, is that the favorable location is the central fact. Even if no permit had been issued to these respondents, their three tracts of land—largely surrounded

[5] If so, the contrast between condemnation proceedings and other transactions would be stark: the enhancement of value stemming from public highways, parks, buildings, and recreational facilities is commonly recognized for purposes of taxation, mortgaging, and private sales.

[6] See n. 2, *supra*.

by the grazing land—were strategically located as logical beneficiaries of the Taylor Act. In determining the market value of respondents' land, surely this location—whether or not a permit had been issued [7]—would enter into any rational estimate of value. This is precisely the rationale of the District Court's jury instruction, which carefully distinguished between the revocable permits "not compensable as such" and the "availability and accessibility" of the grazing land. It is this distinction which the Court's opinion simply ignores.

Finally, I do not think the Court's deviation from the market value rule can be justified by invocation of long-established "basic equitable principles of fairness." *Supra*, p. —. It hardly serves the principles of fairness as those have been understood in the law of just compensation to disregard what respondents could have obtained for their land on the open market in favor of its value artificially denuded of its surroundings.[8]

I would affirm the judgment of the Court of Appeals.

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[7] Even if, suggested as a possibility in the Government's argument, the permits held by respondents had been withdrawn as a prelude to this condemnation, the Taylor Act contemplates their issuance in the public interest and the record discloses no other private landowners as favorably located to qualify for permits as these respondents.

[8] Respondents' witnesses valued the land at figures up to nearly a million dollars, while the Government's expert witness assigned it a value of $136,500. In what was manifestly a compromise, the jury awarded $350,000.